

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Decision 04-15
October 25, 2004

Review File: 04-217-5

A. BACKGROUND

By an undated letter received in my office on June 28th, 2004, the Applicant requested me to review the response he received from the Department of Human Resources regarding his request for copies of information about himself. The Applicant's initial request was directed to the Department of Justice and was for a copy of "any file held by" certain named individuals, all employed by various departments within the Government of Nunavut. One of the names included in the request was that of Leanne Winsor, an employee with the Department of Human Resources. The Applicant's request was, therefore, passed on to Human Resources for response.

The Department indicates that it contacted Leanne Winsor and determined that she had never kept any file on the Applicant. That might have been a complete response to the request. However, the Department advises that, in the spirit of the Act, they went further and through consultations with other employees in the department, determined that another individual, Jan Riddell, in fact maintained a file with respect to the Applicant. The file was reviewed and a number of records were identified as responsive to the Applicant's request. Some of these had already been provided to the Applicant by virtue of a previous Access to Information Request. The Department, however, identified some "new" records (10 pages) and these 10 "new" records were provided to the Applicant. Certain parts of these records were severed, and the Department relied on sections 14(1)(b)(i) and (d) of the *Access to Information and Protection of Privacy Act* as justification for the severed items.

The Department also identified further documents relating to the Applicant which related to his application for outside benefits. Some of these records were released to

the Applicant, but he was advised that others were withheld because they involved a third party. The Applicant was advised that he could request the release of those records and the information would be released if consent from the third party was received. This last set of documents is not dealt with in this Review. As I understand it, the Applicant and the Department of Human Resources are working on this aspect of the request.

The only issue, therefore, is whether the department properly severed parts of the 10 pages identified as being responsive to the Applicant's request.

B. DISCUSSION

The Department relies on section 14(1)(b)(i) and 14(1)(d) of the Act to justify the severance of certain information from the records provided to the Applicant. Those sections reads as follows:

14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal...

(b) consultations or deliberations involving
(i) officers or employees of a public body,

....

(d) plans that relate to the management of personnel or the administration of a public body that have not yet been implemented;

I have had the benefit of being able to review the records in question in their unsevered form. Of the ten pages, two include parts which were severed from the version provided to the Applicant. The first is in a record dated August 15, 2002 (the third page of the package). Although it is not entitled as such, it appears to be a report about the circumstances of the Applicant's situation and an evaluation of the options open to the Department. There are two delineations on this page.

The first is after an entry that starts with the date August 9, 2002. The delineated part of this entry might be considered to be a statement of certain consultations between various government officials about the Applicant's situation and its disclosure might be expected to reveal consultations or deliberations. Accepting this as the case, the public body must use its discretion in deciding whether or not to disclose the information. If the public body, after exercising that discretion, decides not to disclose the information, it has properly applied the act. In this case, however, there is no indication of what considerations went into the exercise of that discretion. I note, for instance, that although this section might be considered to disclose a consultation, that consultation is about the Applicant. One of the primary purposes of the act is to allow "individuals a right of access to" personal information about themselves held by public bodies. Without question, the information in the first severed portion of page three constitutes information about the Applicant. The question is, has the public body weighed the Applicant's right to see that information with the public body's right to avoid disclosure, keeping in mind, as well, that nearly two years have passed since the opinion was given and it has long since been acted upon. There may be other factors which would enter into the exercise of the public body's discretion. I would suggest, however, that because the individual's right to have access to their own personal information is one of the paramount objectives of the Act, that consideration would weigh strongly in favour of disclosure. At the very least, I would say that the public body must give some reasoning for the exercise of its discretion in these circumstances.....something more than "because we can".

The second section of this page which has been severed from the record provided to the Applicant is a paragraph at the bottom of the page which is the third entry in a list under the heading "Findings". If the item is a "finding" it cannot be a consultation because findings are the results of consultations. In this instance, I gather that the public body is, therefore, relying on section 14(1)(d). Had this information been requested before the Public Body had made a decision on how to deal with this situation, I would undoubtedly have agreed that the contents of this paragraph would reveal plans "that relate to the management of personnel or the administration of a public body that have not yet been implemented". In this case, however, the plans,

findings or conclusions have clearly been implemented at this point in time. There is, in my opinion, no discretion left in the public body to refuse the Applicant access to this piece of information.

The second page which contains delineations is the 10th page of the package. It is a memorandum dated March 4, 2003 to Nora Sanders, Deputy Minister of Justice from the Acting Director of a Division of that Department. There are three separate pieces of information which have been severed from this page.

The first is the "Re:" line which precedes the body of the memorandum. The information in this line is the personal information of the Applicant as it relates directly to him. It is not a consultation or deliberation. It is a conclusion. In Alberta, the Access to Information legislation has provisions identical to our section 14(1)(b)(l) of our Act. In Alberta Order 96-006, the Alberta section was considered and the following comments made:

I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action.

The contents of the memorandum are clearly a recommendation, not a consultation or deliberation. Similarly, if the public body is relying on section 14(1)(d), as the recommendation in this case has long since been acted upon, that section is no longer applicable. I can see no reason why this line should not be disclosed to the Applicant.

The other parts of the memo which were severed from the record provided to the Applicant are the first sentence and the end of the last sentence of the memorandum. Once again, these sections contain a recommendation with respect to a personnel matter which has already been acted upon. In my opinion, neither section 14(1)(a)(i) or section 14(1)(d) can apply to give the public body a discretion to refuse disclosure. Furthermore, even if one of these sections did apply, once again, the public body would

have to at least provide some indication of the reasons for the exercise of its discretion not to disclose and, in this case, because the severed information is clearly the Applicant's personal information, and the recommendation was made more than two years ago and has already been acted upon, this would weight heavily in favour of disclosure in any event.

C. RECOMMENDATION

Having completed my review, it is my recommendation that:

- a) The public body should reconsider the exercise of its discretion with respect to the first severed portion of page 3 and, if it decides not to disclose the information contained therein, it should provide the Applicant with an indication of the considerations which went into the exercise of that discretion
- b) the second severed portion of page three should be disclosed to the Applicant
- c) the public body did not have discretion to refuse disclosure of any part of page 10 of the package provided to the Applicant as none of the information severed falls under the discretionary exemption provided for in section 14 (1)(a) or 14(1)(d) and this record should be disclosed to the Applicant without anything severed
- d) In the event that the head of the public body disagrees with my conclusion that section 14 does not apply to page 10, I recommend that the public body reconsider the exercise of its discretion and consider disclosing the severed portions of the record in light of the fact that all recommended actions arising out of the memorandum have now been acted upon and the information constitutes the personal information of the Applicant. If

the public body reaches the decision not to disclose the severed portions of the record, the Applicant should be given an explanation as to the considerations which went into the public body's exercise of discretion.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner
October 25th, 2004