NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER

Review Decision 05-18
April 22, 2005

Review File: 05-122-5

A. BACKGROUND

By a letter dated January 26th, 2005 and received in this office on February 2nd, the Applicant, a member of the press, requested a review of the decision of the Department of Health and Social Services (HSS) to refuse disclosure of a report prepared for that department with respect to the organization of the Baffin Regional Hospital. The report is entitled "Practice Management Consulting Report" (the "Report) and is dated June, 2004.

In response to the Request for Information, the Applicant was advised as follows:

> The report you seek is a review of some Baffin Regional Hospital systems, containing recommendations for the Department of Health and Social Services, and as such need not be disclosed pursuant to s. 14. (1)(1) of ATIPP. The report is an instrument of internal management, enabling hospital management to improve hospital functions and efficiency.

B. ISSUES

There are, in my estimation, three issues in this Request. The first is whether HSS has properly categorized the Report in terms of its content as "advice, proposals, recommendations, analyses or policy options" The second question is a corollary of the first. Is the whole of the record in question (which is some 101 pages long) subject to the discretionary exemption contained in section 14 for advice, proposals, recommendations, analyses or policy options"? If the answer to these questions is "yes", the next question would then be whether or not HSS can honestly be said to have

exercised its discretion under section 14 of the *Access to Information and Protection of Privacy Act* to refuse disclosure.

C. DISCUSSION

The record in question is a consultant's report. In the introduction to the report, the author indicates that his company was contracted by the Department of Health and Social Services to perform an on-site review of the Iqaluit Public Health Clinic in an effort to improve the delivery of healthcare services to the people of Nunavut and to improve the administrative systems and working conditions of medical professionals and their support personnel. In its response to this office as to why access was denied, the Department indicated that the objective of the department in commissioning the report was to create an internal tool to aid management in improving hospital function and efficiency. They suggest that the document produced was for a specific audience and for a very specific purpose. In their view, the record falls squarely into the exemption provided for in section 14(1)(a) of the *Access to Information and Protection of Privacy Act*. That section 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
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council;

The Department further indicated that they were concerned about the impact that releasing the document might have on the Department's ability to ascertain candid input and engage in the type of consultative processes that often form the key components of "these types of reports". In their view, the release of this record could impede their ability to collect the type of information necessary for system improvement in the future.

The Applicant, on the other hand argues that “the department’s need to access information on how to improve their system does not trump the public’s right to know what is being done on their behalf”. He considers this to be an accountability issue and suggests that the Government of Nunavut owes the public nothing less than “full accountability and transparency”. He points to the revelations of the Gomery Commission as support for his position that the public has a right to know how its money is being spent. He further points to a situation in Nunavut in which an individual was apparently dismissed from his employment with the Government based on “unfounded rumors” which were exposed by an Access to Information request. The Applicant says that “without accountability, the public would never hear the truth, and persons violating public trust would never be brought to justice”. He says he is not suggesting that the Department is doing a bad job, or that the officials associated with the information in the report have committed any wrong. Rather, he says, it sounds like they are doing a good job and that the public should know about it.,

Finally, the Applicant points out that there is an option beyond full disclosure of the record and that, if it cannot be released unedited, it should be released with appropriate edits being made.

I start by pointing out that, however laudable the concept of “accountability and transparency” are, the disclosure of information is subject to the exemptions outlined in the *Access to Information and Protection of Privacy Act*. The Act recognizes that there are some records which must remain confidential if the government is to be able to run the “business” of government.

In every jurisdiction in Canada where Access and Privacy laws are in place, there is a provision similar to our section 14(1). In Ontario, for instance, in Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690]

Decisions in other jurisdictions have also held that

> advice or recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)]. (*District Municipality of Muskoka*, Ontario Order MO-1500, Appeal MA-010034-2, Adjudicator Donald Hale)

I am also guided by the discussion of Commissioner Clark (as he then was) in Alberta Order 97-010 [48] to [52] and his reference to the *Treasury Board of Canada Policy Manual-Access to Information Volume, Part 2- Guidelines, Chapter 2-6* which suggest that sections 13 and 14 of the Act reflect different levels of information within the public service hierarchy. As Mr. Clark observed,

> The Act may reflect the fact that, as information moves up the decision making hierarchy of government, that is from research and analysis levels towards Cabinet decision-making levels, it is assumed to take on an increasing amount of sensitivity. Hence, communications between ministers are excluded, Cabinet deliberations, which are the ultimate

> decision-making forum, receive a strong, mandatory exception to disclosure while the research and analysis levels have a discretionary exception.

So the question then becomes whether or not the entire report qualifies as “advice or recommendations”. In my opinion, it does not. Some of the report can be classified as advice or recommendations, but not all of it.

Clearly the title page and the Table of Contents do not contain any advice or recommendations. Similarly, much of the Executive Summary (pages 3 through 11) contain background information and methodology discussions which cannot qualify as “advice and recommendations”. The first full page of the Executive Summary is background information, some of which is apparently available on the Department’s web site. It describes the facility in question and the population it is intended to serve. Similarly that portion of the Executive Summary under the heading “Client Expectations” sets out the mandate given to the contractor. Again, I would not consider this to be “advice or recommendations”. Also included in the Executive Summary is a section called “Methodology”. In this section, the contractor outlines the assumptions upon which the report was founded and the steps taken in completing the report. None of this constitutes advice or recommendations. The first six pages of the report (including the title page), therefore, are not protected from disclosure pursuant to section 14 of the Act and should be disclosed.

Page seven (7) of the report has two headings. The first is “Areas of Best Practice” and the second is “Areas Requiring Improvement”. Strictly speaking, the discussion following the “Areas of Best Practice” is not “advice or recommendations”. Rather, the discussion is more in the nature of a series of “findings” made by the contractor in the course of his study. What’s more, the findings outlined under the heading “Areas of Best Practice” do not project the recommendations made later, and for that reason I would have difficulty classifying these findings as “advice or recommendations”. The discussion under the heading “Areas Requiring Improvement” on the other hand, do project the recommendations made later in the Report. Although the list under this

heading cannot strictly be said to be “advice or recommendations”, they clearly project the advice and recommendations given later in the report. As noted by Mumtaz Jiwan, Inquiry Officer with the Ontario Information and Privacy Commissioner’s Office in Order M-941 (Appeal M - 9600379) when discussing the equivalent section to our section 14(1)(a):

> Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 7(1) of the Act

It is possible that the disclosure of the list under the heading “Areas Requiring Improvement” might allow an accurate inference as to the eventual advice and recommendations provided in the report. To this extent, then, this small section of the Executive Summary appears to fall under the discretionary exemption from disclosure set out in section 14(1)(a) of the Act.

Pages 8 through 11 of the report contain a summary of the Key Recommendations and Benefits. These pages clearly constitute “advice and recommendations” and are, therefore, subject to the discretionary exemption from disclosure provided by section 14(1) (a) of the Act.

The next section of the Report is entitled “Detailed Analysis”. It is divided into several sections, including:

Human Resources - Support Staff Duties
Human Resources - Support Staff Performance
Human Resources - Support Staff Wages and Benefits
Human Resources - Support Staff Appraisals
Human Resources - Support Staff Governance
Human Resources - Support Staff Levels
Governance - Physicians’ Agreement/Recruitment
Governance - Meetings

Financial Management and Accounting
Facility - Design
Facility - The “White House”
Clinic Operations (General)
Appointment Scheduling
Billing
Medical Records
Office and Other Equipment

For each of these headings, the report provides “Observations”, “Recommendations”, “Key Benefits of Recommendations”, “Key Implementation Steps”, “Budget Guideline”, “Priority” and “Timeline”.

With the possible exception of the information which is listed under the heading “Observations” in each case, I have no hesitation in saying that , in my opinion, the remaining headings all contain information that can only be classified as “advice and recommendations” and these are therefore subject to the discretionary exemption from disclosure provided by section 14(1)(a) of the Act. I have more difficulty qualifying the information contained under the heading “Observations” as recommendations and advice. The sections headed “Observations” simply outline the factual observations made by the contractor. To the extent that these “observations” point to deficiencies in the system, they project the “recommendations” made to correct the deficiencies. However, would the disclosure of these sections “permit the drawing of accurate inferences as to the nature of the actual advice and recommendation” made? Clearly, the “Observation” sections identify problems within the system and, in some cases, the observations made inevitably lead to certain logical conclusions about possible solutions. In some cases, however, the inferences or conclusions are not so obvious. I agree with the public body to the extent that it would be very difficult, if not impossible, to sever those parts of the “Observation” sections which project the Recommendations made and those parts which do not. For this reason, therefore, I would say that the “Observation” sections of the report do attract the discretionary exemption contained in section 14(1)(a).

The “Final Summary” section of the report, the first two paragraphs on page 72 do not contain any advice or recommendations, but rather statements of factual background. They are not protected from disclosure under section 14(1)(a). The remaining part of this section, however, is a very brief summary of the recommendations and advice given in earlier parts of the report. It falls within section 14(1)(a).

Following the report itself are three Appendices. I am satisfied that the disclosure of these Appendices would clearly project the nature of the recommendations made in the report and they are, therefore, subject to the discretionary exemption set out in section 14(1)(a).

Having determined that the largest part of the Report is subject to a discretionary exemption as provided for in section 14(1)(a), the next question is whether or not the Department exercised its discretion. It is not for me to say whether or not I agree with the decision reached by the department in exercising its discretion. My role is to comment on whether or not the department took the time to weigh the pros and the cons of disclosure and consciously exercised its discretion having done that balancing. To determine this, I ask questions. What considerations went into the decision not to disclose the information? Did the department weigh the potential benefits of allowing disclosure with the potential harm that might result from a disclosure? What, if any, weight was given to government accountability issues? How would the disclosure of this information affect the department or the potential outcome of the recommendations made? Have any or all of these recommendations been dealt with at a higher level and, implemented? Even if there are some recommendations which are more sensitive to the business/personnel issues of the department so as to militate against disclosure, are there other recommendations which may not have the same impact if disclosed? If the department has clearly gone through the exercise of asking and answering these questions, it is not my position to second guess them.

That having been said, there is little before me to indicate what the thinking process of the department was. In their submissions to me, they indicated to me that

> the objective of the development of the document in question was to create an internal tool to aid management in improving hospital function and efficiency. As a result, the document that was produced is intended for a specific audience and for a very specific purpose. It is an analytical and recommendation-based document that is focused on system improvement. In our view this report, in its entirety, is the very type of record that section 14(1)(a) of the ATIPP Act is intended for.

All of this is true. But none of this suggests that the department did any analysis as to how to exercise its discretion. It seems to me, reading this, that the department simply said "it falls under section 14(1)(a) so it won't be disclosed". The department seems to have missed the point that, having determined that all or some of the record falls under the discretionary exemption of section 14(1)(a), they then have to actively exercise that discretion by asking questions and weighing the pros and the cons of disclosure.

I note that in the next paragraph of their submissions to me, the department suggested that:

> The Department also has serious concerns regarding the impact that releasing this type of document may have on the Department's ability to ascertain candid input and engage in the type of consultative processes that often form key components of these types of reports. As a result, the Department feels the release of this type of document could potentially impede the Department's ability to collect the type of information necessary for system improvement in the future.

This suggests to me that, regardless of what the study is of or what the intention of the report is, the department has made a "policy decision" of sorts to deny access to "this type" of report in any circumstances. I disagree with this position. Each report must be considered on its own merits and discretion must be applied to each report and even, in some instances, separately to different parts of the same report. In this case, for instance, there may well be areas within the report for which the above statement

could truly be said (for example, those parts of the report which deal with personnel issues). Recommendations dealing with physical plant, on the other hand, may not be nearly so sensitive.

C. RECOMMENDATION

Having completed my review, it is my recommendation that:

a) Pages 1 through 6 and the top part of page 7 of the Report (which includes the title page and the index) contain no advice or recommendations and should be disclosed to the Applicant

b) The bottom part of page 7 and pages 8 through 11 are “advice or recommendations” and are, therefore subject to the discretionary exemption provided by section 14(1)(a);

c) Pages 12 through 71 are “advice or recommendations” and are, therefore, subject to the discretionary exemption provided by section 14(1)(a);

d) The first two paragraphs of page 72 are not advice or recommendations and should, therefore, be disclosed to the Applicant;

e) The balance of page 72 and pages 73 to 76 are “advice or recommendations and are, therefore, subject to the discretionary exemption provided by section 14(1)(a);

f) The three Appendices to the report constitute “advice or recommendations” and are, therefore, subject to the discretionary exemption provided by section 14(1)(a)

g) With respect to those parts of the report which are subject to the discretionary exemption of section 14(1)(a), the department must exercise its discretion and be seen to be doing so by giving the Applicant a detailed written explanation as to why they have exercised their discretion in the manner they have chosen to do so. The questions I have posed in the discussion section of this report may assist the department in the active exercise of their discretionary power. In the course of this process I would hope that the department would reconsider its blanket refusal to disclose the advice and recommendations and consider whether there are parts of the report which do not deal with personnel issues which might be disclosed without harming either the consultation process or the ability of the department to do "these kinds" of analysis in the future.

I would like to re-iterate that it is not for me (or for the Applicant) to agree or disagree with the way in which the department decides to exercise its discretion. It is, however, within my mandate to suggest that there is no evidence that the discretion given to them has been actively exercised and I find that to be the case here. My recommendation, therefore, is that the department exercise its discretion and consider whether or not to disclose parts or all of the report which constitute advice and recommendations. In the exercise of that discretion, I anticipate that the department would be sensitive to the stated purpose of the Act (to make public bodies more accountable to the public) and the current political climate brought on by the Gomery Commission.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner
April 27, 2005