

NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Decision 05-21
November 14, 2005
Review File: 05-184-5

A. BACKGROUND

On July 28th, 2005, I received a request from the Applicant to review the response which she had received from the Department of Education to a request which had been made for a copy of the full "Aaqqigiarniq, Time to Move Forward" report. A copy of the report was provided, but sections of it were omitted or otherwise severed. The department relied on section 14(1)(a) and 14(1)(b) of the Act as justification for refusing to disclose those portions of the Report which were not provided.

B. POSITIONS

The public body relies on section 14(1)(a) and 14(1)(b) of the *Access to Information and Protection of Privacy Act*. Those provisions provide 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;

(b) consultations or deliberations involving

- (i) officers or employees of a public body,
- (ii) a member of the Executive Council, or
- (iii) the staff of a member of the Executive Council;

The public body takes the position that many of the excluded portions of the report constituted "advice, proposal, recommendations, analyses or policy options" developed for a public body. The remaining excluded portions, they say, constitute consultations or deliberations involving officers or employees of a public body. In particular, they

say that those portions of the report which were excluded involved the results of interviews with individual staff of Nunavut Arctic College and to disclose them “could have deleterious effects on individual staff of Nunavut Arctic College, relations between the College, Departments of the Government of Nunavut , and third parties, and could compromise the college’s competitive position”. They also stated that the revelation of the excluded sections “could compromise the strategic planning by the College and the Department of Education and could compromise the College’s competitive position.” No explanation or reasoning was provided with respect these predictions.

The Applicant begins by arguing that the specific intention and purpose of the Act is to provide for access and that exceptions should be narrowly applied. They cite Section 1 of the Act which states as follows:

1. 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 the unauthorized collection of personal information by public bodies; and
 - (e) providing for an independent review of decisions made under this Act.

The Applicant relies on a number of cases from the Federal Court and the Supreme Court of Canada, all of which stand for the proposition that, in interpreting the *Access to Information and Protection of Privacy Act*, disclosure should be the rule and exemptions should be both limited and specific.

With respect to section 14(1)(a), on whether the information in question constitutes “advice, proposals, recommendations, analyses or policy options “ the Applicant relies

on the precedent provided by the Ontario Information and Privacy Commissioner in Order P-920, which states as follows:

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(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.

They further rely on an Order of the Alberta in Order 99-001, in which the Alberta Information and Privacy Commissioner provided a set of criteria for determining when information can be qualified as “advice”:

The advice should:

- a) be sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
- b) be directed toward taking an action; and
- c) be made to someone who can take or implement the action.

Also quoted is Order 98-011 of the Alberta Information and Privacy Commissioner’s Office:

Furthermore, even if it could be said that the Public Body sought or expected advice or recommendations, it could not be said that the advice or recommendations were part of the responsibility of a person by virtue of that person’s position when the survey was sent essentially to all staff, and when the Assistant Deputy Minister’s instructions for completing the survey state that it is not necessary that individuals identify themselves or their district office. Information about the individual’s type of employment position is also optional in the survey.....In this case if the Public Body were to ask itself “What would the disclosure of the survey responses reveal?”, I believe that, at most, it could be said that the disclosure might reveal that the staff were unhappy with the redesign and did not feel that they were involved in the decision making process.

Finally, with respect to section 14(1)(b), which provides the public body with the

discretion to refuse access to a record where the record constitutes “consultations or deliberations” involving officers or employees of a public body, the Applicant again relies on Order 98-011 from the Alberta Information and Privacy Commissioner where these terms are defined as follows:

In Order 96-006, I defined “consultation” and “deliberation”. I said that a “consultation” occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions. I found that “deliberation” is a discussion or consideration, by the individuals described in the section, of the reasons for and against an action .

In conclusion, the Applicant makes the submission that it appears that the report is a fact finding report that makes recommendations that are not directed at any specific course of action which will ultimately be accepted or rejected by its recipient and that the survey of staff and students is simply an element of the fact-finding report, and not a consultation that meets the requirements of section 14(1).

C. DISCUSSION

I agree with the general statements made by the Applicant with respect to the purposes of the Act. I have said in past recommendations that when exemptions are applied, particularly discretionary ones, they should be applied narrowly and the benefit of the doubt should always be on the side of disclosure.

I have had the benefit of having the full report which is the subject of this request to assist me in my review. There are a number of sections which have been excluded and I will comment on each of them.

I would preface my comments by pointing out that section 14(2) provides that the discretionary exemption provided for in section 14(1) does not apply where the record is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal and it seems to me that this

might apply to most of the portions of the record which were severed. Neither of the parties referred me to this subsection however and I am not, therefore, basing my recommendations on section 14(2). It may be, however, that this section of the Act may have some bearing and influence on the discussions which follow.

The first section which was excluded is on page 19 of the record. It is under a section entitled "Methodology". In this section, the writer outlines how the writer of the report went about gathering his information. The department relies on section 14(1)(b) for refusing to disclose this paragraph. They claim that it constitutes "consultation" with officers or employees of the public body. In my opinion, this paragraph does not constitute "consultation". The deleted section consists of one sentence which could not be expected to reveal the substance of any consultation. In my opinion, it does not qualify for an exemption from disclosure pursuant to section 14(1)(b).

The next section which has been deleted from the report provided to the Applicant is on page 31 under the heading "Resource Utilization and Efficiency". The deleted section includes a section sub-titled "Interview findings" as well as a section sub-titled "Consultant's Conclusions and Recommendations". The department relies on Section 14(1)(b) and 14(1)(a) respectively to sever these two portions of the record.

The first section entitled "Interview Findings" contains 12 bulleted paragraphs. The public body says that this if this section is disclosed, it will reveal "consultations or deliberations involving employees of the public body". Keeping in mind that disclosure is the rule and exemptions should be interpreted as narrowly as possible, I am not convinced that section 14(1)(b) applies in this case.

It is important to consider the specific wording of section 14. The requirement is that the disclosure of the record, or in this case, the section which was severed, might disclose consultations. The issue here is not whether employees or others were consulted for the purpose of the report, but whether the nature of the consultations would be disclosed and the individuals involved in the consultations are identifiable. As

noted by the Alberta Information and Privacy Commissioner in Order 96-006,

The next issue is whether section 23(1)(b)(i) (“consultations or deliberations”) apply to the Records. In the broadest sense this section could be used to withhold any discussion whatsoever between any of the parties named in the section. If this were so, there would be very little access to any information under the Act. This cannot be right given the purpose of the Act which is stated in section 2 to be “...to allow any person a right of access ... subject to limited and specific exemptions as set out in this Act.”. When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, “looking bad” or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia.

I agree with this interpretation. It appears to me, firstly, that the general consultations went beyond just “employees” of the department and included a significantly wider audience. Section 14(1)(b) is intended to protect only consultations involving employees and officers of the public body, not wider consultations. Secondly, the “Interview Findings” are general in nature and do not name any specific individual or the source of any specific “finding”. I see nothing in the report which would serve to identify the opinions of individuals either inside the institution or outside of it. If the purpose of this section is to allow free and open discussions, unless the specific sources of the specific statements can be identified, this section does not meet the intended purpose of the exemption. This section of the report does not reveal the specifics of any one interview. In my opinion, this section cannot be protected from disclosure pursuant to section 14(1)(b) for both of these reasons and it should be disclosed.

The following section is entitled “Consultant’s Conclusions and Recommendations”. The public body relies on section 14(1)(a) (advice and recommendations) to deny disclosure of this section.

Other things being equal, I would have no difficulty in finding that the information under this heading that has been severed constitutes “advice and recommendations” and

would be subject to a discretionary exemption pursuant to section 14(1)(a) of the Act. However, in this instance, the first two paragraphs and the last paragraph of this section have already been disclosed in a “summary of recommendations” which appears at the beginning of the report and which has already been disclosed to the Applicant. Once a record is disclosed, it would seem to me that the public body’s discretion has been exercised. These paragraphs should be disclosed.

Following the second paragraph of this section are a series of paragraphs which contain a date followed by an action. These appear to have been quoted directly from another document prepared by the Secretary, Crown Agency Council, who is a Government of Nunavut employee within the Department of Finance. On the surface, and without any specific input from the public body with respect to this issue, it seems to me that this list of recommendations as a separate document would be subject to an access to information request. The public body has not provided me with any specific reason why this transcribed list should not be disclosed. Pursuant to section 33 of the Act, the onus is on the head of the public body to establish that the applicant has no right of access to a record or part of a record in these circumstances and they have not provided me with anything which convinces me that this list of recommendations transcribed from another record would not be available to the Applicant. It is therefore my recommendation that these paragraphs also be disclosed, subject only to any specific exemption which might apply to the recommendations in their original form.

The next set of items which have been severed from the report provided to the Applicant are under the heading “Comparative College Performance Indicators” on page 35 of the original report (page 32 of the copy provided to the Applicant). Once again there are two sections - the first entitled “Interview Findings” and the second entitled “Consultants Conclusions and Recommendations”.

The comments made above with respect to the previous subsection entitled “Interview Findings” apply equally here.

With respect to the subsection entitled “Consultant’s Conclusions and Recommendations” the consultant has dealt with the recommendations a little differently than he/she did in the first section of the report. Here, there is a brief statement which I would classify as “analysis” by the contractor before the actual recommendation is made. The recommendations themselves have, once again, already been disclosed to the Applicant in an earlier section of the Act and there is no reason not to disclose them a second time. In my opinion, however, the “analysis” which precedes these recommendations is subject to the discretionary exemption of section 14(1)(a).

Section 14(1)(a) provides for a discretionary exemption. Even when the section applies, the public body still has to use its discretion in deciding whether or not to disclose the information. I have said in previous recommendations that it is not for me to say whether or not I agree with the way in which the discretion is exercised. That having been said, however, I do take the position that where discretion is granted, the public body must be able to show that they have, in fact, exercised that discretion by outlining in some detail the reasons they have chosen not to disclose the information. This includes providing the Applicant with an explanation as to why the discretion has been exercised to deny disclosure. That explanation does not appear to have been given in this case and it is therefore unclear whether the public body’s discretion has, in fact, been exercised. Speculation as to what “could” happen without more does not, in my opinion, qualify as a proper exercise of discretion.

The next section severed is under the heading “Information Technology” on page 37 of the original report (page 33 of the Applicant’s copy). In this section, there is only one section severed, in this case the one entitled “Interview Findings”. My comments above apply here as well. It is to be noted that this section also includes two specific recommendations which, once again, have already been disclosed in an earlier section of the Act.

The report continues under various headings to include a sub-section on “Interview

Findings” and “Consultant’s Conclusions and Recommendations”. My comments above apply in each case.

On page 61 of the original report (page 46 of the Applicant’s copy) under the heading “Internal Communication” the public body has severed a section under the sub-heading “Indicators”, citing section 14(1)(a) of the Act (advice and recommendations). I cannot agree that the last sentence of the first full paragraph of this section is advice or recommendations. What follows is a list of “general principals” which would go into developing a policy around a particular issue. Although these are not stated to be “recommendations” and are not included in the summary of recommendations early in the report, they are clearly written with the intention that the suggestions be put into practice. To the extent that these suggestions have not been previously disclosed in the report, they are, therefore, subject to the discretionary exemption of section 14(1)(a). There must, therefore, be a real exercise of discretion as discussed above.

Similarly, under the next section entitled “External Communication”, the public body has severed a small section of the report under the “Indicators” subsection which is in the same vein as that discussed above. Once again, the last sentence of the first paragraph of this subsection does not, in my opinion, constitute advice or recommendations but the following bulleted list may do so, and the public body should exercise its discretion.

Under the section entitled “Summary” which starts at page 97 of the original copy of the report and page 63 of the Applicant’s copy, the public body has severed a section which begins with the fourth paragraph on the page and continues through a list of eleven bulleted items. The public body claims that these have been severed pursuant to section 14(1)(b) (consultation and deliberations). Once again, although the consultant outlines some of his conclusions and findings as a result of his investigation, I do not consider the statements made in this severed portion of the report to be “consultation and deliberation”. None of the conclusions cited are capable of being traced back to individual respondents.

Finally, the public body has declined to disclose the list of interview contacts which forms an appendix to the report. I am satisfied that this is all that is needed to ensure that those who participated can be satisfied that their participation cannot result in any negative feedback toward them personally and that this section was properly severed.

The public body did not rely in any instance on section 17 of the Act which provides public bodies with a discretionary exemption to the disclosure of information where there is some concern that the disclosure might affect the competitive position of the government or the public body:

17. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the economic interest of the Government of Nunavut or a public body or the ability of the Government to manage the economy, including the following:....

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with contractual or other negotiations of, the Government of Nunavut or a public body;

This section was, however, alluded to briefly in the short submissions provided to me where they indicated that the disclosure of the severed portions of the report “could” adversely affect the competitive position of the college or of the public body”. If the public body could substantiate its concern about the possibility that the disclosure of any section of the report might affect the competitive position of the college, section 17 might apply to give the public body a discretionary exemption under the Act, quite apart from section 14 and whether or not section 14 properly applied. As it is, however, the public body has neither referred me to this section as the basis of its reason for declining to disclose or provided any substantive indication as to how the competitive

position of the college might be affected by disclosure. Section 33 of the Act puts the onus of establishing that an Applicant does not have a right of access to a particular record or part of a record on the public body and they cannot rely on section 17 without first putting forward a factual basis for their belief.

C. RECOMMENDATION

In view of the above discussion, I make the following findings and recommendations:

Referring to the page numbers in the original report:

- Page 19 - the deleted section should be disclosed
- Page 31 - the section entitled "Interview Findings" does not fall within the exception provided for in section 14(1)(b) and should be disclosed;
- Page 32 - in the section entitled "Consultants Conclusions and Recommendations" the recommendations themselves have already been disclosed in an earlier section of the report and should not, therefore, be severed from the copy provided to the Applicant. Those portions of the second recommendation on page 33 which immediately follow the bulleted paragraph should be considered for disclosure in accordance with the provisions of the Act as they appear to have been transcribed directly from another record;
- Page 35 - the section entitled "Interview Findings" and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.
- Page 37 - those portions of the section entitled "Interview Findings" which are in bold print should be disclosed. The remainder of this portion does fall within the scope of section 14(1)(a) as analyses and the public body should

exercise its discretion in deciding whether or not to disclose it.

- Page 39- the section entitled "Interview Findings" and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.
- Page 40 - the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.
- Page 43 - the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.
- Page 45-50 - the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.
- Page 51-53- the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 55-57 - the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 59-61- the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 61 - the last sentence of the first paragraph under the title "Indicators" does not qualify for an exemption under section 14 and should be disclosed. The eleven bulleted paragraphs which follow do fall within the scope of section 14(1)(a) as advice or recommendations and the public body should exercise its discretion in deciding whether or not to disclose them.

Page 63-64- the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 65 - the last sentence of the first paragraph under the title "Indicators" does not qualify for an exemption under section 14 and should be disclosed. The eleven bulleted paragraphs which follow do fall within the scope of section 14(1)(a) as advice or recommendations and the public body should exercise its discretion in deciding whether or not to disclose them.

Page 65-67 - the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be

disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 70-75 - the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 76-78- the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 79-80- the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 82-84- the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 85-87- the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope

of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it.

Page 92-96- the section entitled "Interview Findings" (including the results of the survey questions) and those portions of the section entitled "Consultant's Conclusions and Recommendations" which appear in bold face should be disclosed. The remainder of this latter section does fall within the scope of section 14(1)(a) as analyses and the public body should exercise its discretion in deciding whether or not to disclose it. I note that in this case, the analyses attached to one of the recommendations has been disclosed.

Page 97- the severed portion should be disclosed

Page 112-113 - this section was properly severed pursuant to section 14(1)(b) as well as section 23 of the Act

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner
November 14, 2005