

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 07-34
November 21, 2007
Review File: 07-217-5

I. BACKGROUND

By letter dated June 12th, 2007, the Applicant requested documentation from the Department of Health and Social Services, specifically the following:

- a) Andrew Johnson's reply to [C.D.] and [E.F.], including the documents requested by [C.D.] and [E.F.]

- b) the file relating to the investigation which, according to Mr. Johnson, was conducted against [the Applicant] pursuant to the provisions of the *Child and Family Services Act*

It should be noted at the outset that I will use the initials "C.D." and "E. F." throughout these recommendations to refer to two third parties whose names came up during the review process. Neither of these people were involved in the matter except as private citizens and by reference only.

The request relates to records arising out of events which happened a number of years ago. At the relevant time, Andrew Johnson was a senior employee of the Department of Health and Social Services. C.D and E.F appear to have been in some way involved in an investigation undertaken regarding allegations made against the Applicant concerning the welfare of a child. It appears from the documentation provided by the Applicant that C.D. and E.F may at some point have asked to receive a copy of the investigation file. The Applicant is now seeking a copy of the answer which was given to C.D. and E.F. as a result of their request for the file, as well as for a copy of the file itself.

The public body responded to the Applicant's Request for Information indicating that they could find no records responsive to the request, resulting in the Applicant's request to this office to review that response.

In his Request for Review, the Applicant provided copies of various records indicating that there was, indeed, a file relating to an investigation conducted as a result of a complaint against the Applicant. He in fact provided a copy of a letter he had received from the public body several years ago in response to an earlier request for the same information. In that letter, the public body had acknowledged that there was a file with respect to the matter in question.

In its response to my request for an explanation, the department indicated that they had done extensive searches when they received the Applicant's Request for Information but could find no responsive records. They also indicated, however, that after receiving the additional information included in the Applicant's Request for Review which had not been provided in the initial Request for Information, they were able to find responsive records to the second part of the Applicant's request. However, they say that the records could not be disclosed to the Applicant because they formed part of a child welfare file which they were prohibited from disclosing pursuant to the *Child and Family Services Act* notwithstanding the provisions of the *Access to Information and Protection of Privacy Act*. They pointed out that the Applicant had made a request for exactly the same information several years ago and had been denied access on the basis that the records formed part of a child welfare file pursuant to the *Child and Family Services Act*.

The public body also indicated that, even with their secondary search after receiving the Applicant's Request for Review, they were unable to find any document which would be responsive to the first part of the Applicant's request. They did say, however, that had C.D. and E.F. requested information from the file, they would have been refused access to the contents of the file for the same reason that the Applicant had been denied.

The Applicant was provided with a copy of the public body's response and given the opportunity to provide further submissions but no further submissions were received.

II. ISSUES

In my opinion, the issues in this case are twofold:

1. Did the public body comply with section 7(1) of the Act which requires a public body to "make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay?
2. Is the Applicant entitled to receive the records in the possession of the department which relate to a child welfare matter?

III. DISCUSSION

With respect to the first question, the public body indicated to me the steps it had taken to find any records that might have been responsive to the Applicant's requests for information. They indicated to me that a total of approximately 12 hours had been spent in the initial search for the records requested by the Applicant. Their search included the Records Centre which performed a search for the file in question. All of the files in the Health and Social Services Headquarters were checked and nothing was found. They were in touch with two additional departments which might have had further information about the matter, but nothing pertaining to this request was found. It was not until they received the additional information revealed in the Applicant's Request for Review that they were able to locate the records responsive to the second part of the Applicant's Request for Information.

With respect to the first part of the request, the public body says that C.D. and E.F. were never provided copies of any records and there is no indication on the file that a letter was ever written to them in response to their request for that information.

Furthermore, they confirm that no information would have been provided to them in any event as such disclosure is prohibited by the *Child and Family Services Act*. I am satisfied that the public body made every reasonable effort to locate the documents requested by the Applicant. Unfortunately, the Applicant had simply not provided all of the relevant information in the first instance which might have pointed them in the right direction. It is to the department's credit that they continued to search for the records upon receiving the new information and were, in fact able to locate them. I am satisfied that the public body put genuine effort into its attempt to discover the records requested. The only thing I might suggest is that where, as here, the Applicant appears fairly certain about the existence of records and the public body is having difficulty in locating them, it might be a good idea to confer with the Applicant to see if he has any further information which might assist the search. If the Applicant has a genuine interest in obtaining copies, it seems to me that he or she is likely to cooperate in providing as much information as possible to assist the public body's search.

With respect to the second part of the Applicant's Request for Information, the Applicant's position is that he has an "unfettered right" of access to any information about him contained in any record held by a public body.

I disagree with his assessment that he has an "unfettered right" to receive his own personal information. Generally speaking, every individual is entitled to access to records held by public bodies which contain their own personal information. There are a number of instances, however, in which an individual will not be entitled to have access to his or her own personal information. One of these instances is when the information is contained in a child welfare file. Section 71 of the *Child and Family Services Act* provides as follows:

- (2) Notwithstanding the provisions in the *Access to Information and Protection of Privacy Act* allowing disclosure of personal information as defined in that Act, no person referred to in subsection (1) shall disclose or communicate any information or record of information described in subsection (1) to any person except

- (a) where necessary or appropriate in the exercise of his or her powers or in the performance of his or her duties under this Act or the regulations;
- (b) with the written consent of the person to whom the information or record relates;
- (c) where giving evidence in court;
- (d) on the order of a court;
- (e) to a person appointed to conduct an investigation under section 64 or 65;
- (f) to the Minister, the Director, an assistant Director, a Child Protection Worker or an authorized person, at their request;
- (g) to a peace officer, if the person believes on reasonable grounds that
 - (i) failure to disclose the information or record of information is likely to cause physical or emotional harm to a person or serious damage to property, and
 - (ii) the need for disclosure is urgent;
- (h) where a disclosure or communication is required for the purposes of this Act or to protect a child;
- (i) where necessary for the provision of care, counselling or education to the child;
- (j) where, in the opinion of the Minister, the benefit of the release of the information would clearly outweigh any invasion of privacy that could result from the release; or
- (k) where it is required for the purposes of this Act.

The information requested by the Applicant in this case relates to a child welfare issue. For such records, the *Child and Family Services Act* takes precedence over any access provisions outlined in the *Access to Information and Protection of Privacy Act*. The Applicant does not, in fact, have an "unfettered right" to access his own personal information in this circumstance. The public body is prohibited by legislative enactment from disclosing this information.

IV. CONCLUSION AND RECOMMENDATIONS

As noted above, it is my opinion that the public body in this instance made a genuine good faith attempt to locate the records requested by the Applicant.

That having been said, I do have some concerns that the records referred to in the second part of the Applicant's request were not discovered in the first attempt by the public body, not because I think that the officials of the public body looking for the records did not do their job, but because of what appears to be a problem in the record keeping system itself. It seems to me that the file in question should have been discovered with the information initially provided by the Applicant. His request included names of some of the parties involved, as well as the specific nature of the file, being a child welfare file. It is not clear from the public body's response what new information contained in the Request for Review enabled them to discover the records. If, however, it was a matter of departmental employees not following proper records management protocols in terms of ensuring that files are properly indexed and recorded, that should be addressed. Without more information about why the file was not discovered in the first instance, however, it is difficult for me to comment further or make any specific recommendations.

As noted above, there may also have been some merit in making further inquiries of the Applicant when the records could not be found in the first instance. In this particular case, however, I do not fault the public body for not making those further inquiries as it was not clear from the materials they had from the Applicant that he may have additional information about the records which would have been helpful. It may, however, be something to keep in mind in the future where a public body is unable to locate specific documents. Applicants in all cases should be encouraged to provide as much relevant information as possible in order to focus the search for records in the appropriate direction and where there are apparent gaps in the information available, it may be helpful to see if the Applicant can fill those gaps.

Insofar as the Applicant's entitlement to receive the records in question, I am satisfied that the public body properly interpreted the provisions of the *Child and Family Services Act* in refusing disclosure both on the Applicant's previous request for the information and in this instance.

In the circumstances, the only recommendation I would make is that the public body investigate why the records in question did not surface during the first attempt to find them and to take such steps as necessary to ensure that, if the issue was one of records management, steps are taken to address those issues as soon as possible. Good records management practices are, of course, integral to the ability of any organization to be able to locate and recover records, particularly as those records become more dated.

Elaine Keenan Bengts
Information and Privacy Commissioner