

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 08-044
August 6, 2008
Review Files: 07-273-5 and 07-274-5

A. BACKGROUND

This recommendation will address the issues raised in connection with two separate requests made by the same Applicant for information from two public bodies: the Department of Education and the Department of Health and Social Services.

Specifically, the Applicant sought information about the amount of money spent by each of these departments in providing specialized health and educational services to his family as well as the amount of money spent by the Government of Nunavut on legal services in relation to his case. In addition to this specific information, the Applicant sought "all material on [his] family" held or gathered by the Government of Nunavut since a particular date. Further, he asked for "a complete list of all people who have been active on decisions related to the family, and a description of their involvement including approximate length of time involved".

The initial requests were made on or about June 14th, 2007. There was some initial concern that Health and Social Services (HSS) did not respond within the requisite 30 day time period from their receipt of the Request of Information. On my investigation of this complaint, however, it became clear that HSS followed the appropriate protocols to extend the time for responding pursuant to section 11 of the *Access to Information and Protection of Privacy Act* by sending the Applicant a letter on July 10th extending the time for response for approximately one month to August 12th (which was a Sunday). This letter also included approximately 100 pages of records that had been identified at that point. On August 13th, a box containing approximately 2500 additional pages was shipped to the Applicant. At this point, I would suggest that the issue of whether or not the Department complied with the deadline is moot in that the Applicant received a fairly timely response, even if it was sent one day late.

On approximately September 10th, 2007, the Applicant contacted HSS and indicated that he was concerned that not all of the information he had requested had been received and that there was information missing, in particular about legal fees paid in relation to the matter. A secondary search was completed and additional information sent to the Applicant on or about October 4th. Similar information was requested from the Department of Education. An initial package of approximately 670 pages was provided to the Applicant. The Applicant challenged the public body on information he felt was missing from the package and the Department did a secondary search and subsequently provided the him with an additional 32 pages.

By letter dated November 1st, 2007 and received in my office on November 20th, the Applicant asked me to review the responses he had received to his Request for Information. On the face of the request, the Applicant was not concerned with the response received to the general part of the requests (Le. - information about the family), but were focused on what he felt was missing from the response in terms of the cost of providing various legal and medical services to the family. Specifically, the Applicant felt that there was information missing about the cost of services provided by a particular lawyer employed by the Legal Services Board of Nunavut and by a lawyer employed as "in-house" counsel for the Government of Nunavut. He was also not convinced that he had received a full picture of the monies paid to a private firm of lawyers employed by the Government of Nunavut to represent the interests of the Government in his dispute. Finally, he pointed out that there was very little information provided about the amount of money spent on medical and other treatments, which was also part of his request.

I asked for and received a copy of all records identified by the public bodies as being responsive to the Request for Information, and reviewed all pages received.

B. ISSUE

The only issue the Applicant has asked me to address is whether he received all of the records responsive to his request for information insofar as it relates to the cost of services provided to his family.

C. THE RELEVANT PROVISIONS OF THE ACT

As the issue in this case is one of incomplete disclosure, as opposed to concerns about how the records were edited prior to disclosure, there is no one specific section in the *Access to Information and Protection of Privacy Act* which will apply. However, there are a number of provisions in the Act which assist in assessing the issues as follows.

Section 2 of the Act includes definitions including the following:

"public body" means

- (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

"record" means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or other mechanism that produces records

Section 3 provides that the Act applies to all records "in the custody or under the control of" a public body, with certain limited exceptions, none of which apply to this case.

Section 5 of the Act provides that:

- (1) A person who makes a request under section 6 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

Finally, section 7(2) provides that:

- (2) The head of a public body shall create a record for an applicant where
 - (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

- (b) creating the record would not unreasonably interfere with the operations of the public body.

D. DISCUSSION

As noted above, I have had the opportunity to review all of the records identified as being responsive to this request for information. It was not an insubstantial request. The Applicant has a long history of dealing with the Government of Nunavut and the records are quite extensive. As a preliminary observation, I would say that I was pleased to see that although the public bodies could have resorted to a number of discretionary exemptions to refuse disclosure to many of the records, they chose not to do so.

Between the two public bodies, over 3000 pages of records were identified as responsive to the request for information. There were only a handful pages which were not disclosed at all and only a few which were edited in some way before being disclosed. Most of the information which was severed was third party personal information, the disclosure of which is prohibited pursuant to section 23 of the Act and financial information of third parties, the disclosure of which is prohibited pursuant to section 24. There were also small portions of some records which were severed pursuant to section 15 of the Act (solicitor/client privilege). In this case, both public bodies were very careful about allowing as much disclosure as possible and I applaud them for that approach.

The Applicants raised a number of specific concerns with respect to the responses provided by both public bodies.

1. There were no invoices provided for services provided to the Applicant by a lawyer assigned to the Applicant by Legal Aid.

In their initial response to me and to the Applicant, both public bodies suggested that they did not have access to the records of Maliiganik Tukisiiniakvik (Legal Aid) and could not, therefore, provide the information requested. I challenged them on this

statement and they conceded that this was not, in fact, the case and that the Legal Services Board was a public body as defined in the Act. Despite this, they said that they were still not in a position to provide the specific information requested by the Applicant because, unlike private sector lawyers, lawyers employed by Legal Aid in Nunavut are not required to keep track of the time they spend on any particular case, nor do they invoice the Government of Nunavut on a case by case basis. This is no doubt true for "in house" legal aid lawyers, who are paid a salary and simply do the work assigned to them. It is my understanding that they do not keep time records or "bill back" the time spent on any one file. It is not, therefore, possible to create a record showing the number of hours spent by an "in house" lawyer. In short, the information requested by the Applicant with respect to the cost of services provided to them by the Legal Aid lawyer is simply not available if the lawyer involved is an employee of the Legal Services Board.

However, not all lawyers engaged to provide legal aid services to the people of Nunavut are "in house" lawyers. The legal aid system in Nunavut is a hybrid one which relies on the services of both in-house and private sector lawyers. Those private sector lawyers who take Legal Aid cases are required to provide invoices for payment and, unless the system has changed drastically in the last few years, they are paid based on an hourly rate and must provide detailed accounts for payment.

It is my understanding that the "legal aid lawyer" involved in this case was a private sector lawyer. As such, there should be records of the accounts which he submitted to the Legal Services Board for payment with respect to the Applicant's matter. At the very least, it seems to me that the public bodies in this case should have transferred this part of the Request for Information to the Legal Services Board for response. The Legal Services Board is subject to the *Access to Information and Protection of Privacy Act* by virtue of the regulations made pursuant to that Act.

2. There were no invoices disclosed for work done on this file by legal counsel employed full time as "in-house" counsel for the Government of Nunavut.

The Applicant seeks to obtain information relating to the value of legal services provided by a particular lawyer employed by the Department of Justice in Nunavut. Again, this person is/was a full time salaried employee of the Government of Nunavut. In house counsel do the work assigned to them and are not required to create invoices for time spent on any particular file. In the process of doing my review, I contacted the Director of Legal Services with the Department of Justice to confirm that this is the case. He advised me that there is no requirement placed on lawyers within the department to account for their time or record the time they spend on any particular file. In these circumstances, the information requested by the Applicant is simply not available.

3. The invoices provided for one of the private firm of lawyers involved in the matter were not complete.

The Applicant felt that there was no evidence in the invoices disclosed to suggest that the private firm engaged to deal with this matter for the Government of Nunavut spent any time reviewing the records involved in this case and, because of the long history of the matter, it was his belief that this should have been the single biggest expense reflected in the legal billings.

I have reviewed the lawyer's invoices carefully. They are detailed and account for more than 500 hours of billed time over a ten month period between February and November of 2006. Each of the invoices includes detailed information including the dates services were provided, the initials of the lawyer providing the services, the actual services provided on that particular date, the time spent on each date and the total amount billed for the time spent on that date. (It should be noted that in the copies provided to the Applicant, the number of hours spent was severed pursuant to section 24 of the Act, but all other information was disclosed). The other records I have reviewed (e-mails, etc) show that this firm became involved in the matter in mid January, 2006. This is consistent with the billings indicated on the invoices. There is an invoice in each month during the ten month period except for the month of July. A review of the invoice issued in August, however, indicates time spent on the file in July so there is no gap in the

billing periods. In short, I can find nothing to suggest that the invoices provided do not represent the full amount invoiced by the law firm in question in relation to this case and I am satisfied that the records received by the Applicant represent an accurate reflection of the billings submitted by the firm for work done with respect to the Applicant's case.

4. Finally, the Applicant suggests that there is little information about the amount of money spent on medical and rehabilitation services.

Scattered in amongst the more than 3000 pages of records are some invoices and some information relating to the costs of providing medical and rehabilitation services to the Applicant's family. There is no "summary" or list of the cost of such services.

1997- February, 2006

It is clear from the records I reviewed that there were monies expended on medical and rehabilitation services for the Applicant's family between 1997 and 2004. In fact, in some of the correspondence and other records reviewed, there is a suggestion that an amount in excess of \$300,000.00 had been spent on various aspects of care for this family in this period of time, but there do not appear to be any specifics provided about how this number was calculated. The number was fairly specific and I surmise from this that it came from somewhere. The specifics, however, were not provided.

February, 2006 to June, 2007

It is also clear from the materials provided that additional funds were expended between March of 2006 and June, 2007 for medical and rehabilitation services. A number of contracts with service providers were disclosed and these contracts suggest maximum amounts which might be expended, particularly for the period between March 2006 and September, 2006. As far as I can tell, however, there is nothing in the materials which indicate the amounts actually paid out on these contracts. The exception to this is monies spent on professionals for an assessment, apparently paid

for by the Department of Education, toward the end of this period, for which there is sufficient information that the Applicant can determine the amounts actually spent by reviewing the invoices and contracts disclosed. The amount spent for other services, however, are not so clear. Some monies were clearly paid directly to the Applicant pursuant to various agreements and other arrangements entered into between the Government and the Applicant but there is no listing or accounting of these amounts. In addition, it appears that other medical and rehabilitation professionals provided services for this family, paid for by the Government of Nunavut during this period of time, but as far as I can tell, there is nothing which shows the amounts paid for these services.

E. RECOMMENDATIONS

In light of the above, I would make two recommendations:

1. That the Public Bodies involved (Health and Social Services and Education) follow up with the Legal Services Board to determine whether the lawyer engaged to deal with this matter was an in-house lawyer or a private sector lawyer. If he was a private sector lawyer, I recommend that steps be taken within 30 days to provide the Applicant with copies of any invoices submitted to the Legal Services Board by that lawyer for the provision of services in connection with the Applicant's case(s), subject to any appropriate severing which might be necessary in accordance with the Act.
2. The Act requires public bodies to "make every reasonable effort to assist an Applicant" and a responsibility is imposed on public bodies to create a record where it can be created "from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise". From what I know of government book keeping practices, "expenditures" are coded and it should be possible to put together a list of most (if not all) of the amounts spent on the specific needs of the Applicant's family based on the contracts entered into for services specific to this family. I understand that it may not be possible to identify all costs associated

with this family, particularly in light of the fact that the issue arose prior to division and some records may no longer be available in Nunavut and that some of the services provided, while focused on this family, may have been attributed to a more general mandate of the Government. But, based on my review of the records, it does appear that there are a number of very specific contracts with a fairly limited number of service providers and with the Applicant himself which should provide a relatively accurate reflection of the funds spent. I do think that it should be possible to put together some kind of record which will identify for the Applicant the monies spent in relation to the provision of services to him and his family with more specificity than has been done. I therefore RECOMMEND that the Department of Health and Social Services and the Department of Education use their best efforts to determine the specific amounts paid out

- a) to medical and rehabilitation services providers for provision of services to the Applicant and his family from 1997 to June of 2007, including the costs of training and purchasing necessary equipment;
- b) to or for the Applicant and/or his family, other than legal costs, in relation to the issues at hand during that period, including the cost of travel and other costs incurred for or by the Applicant and his family;

and, within 60 days, to provide the Applicant with a list of those amounts, the specific service providers paid, the dates of payment and any other information which might be relevant to the Request for Information.

Based on the fact that the Applicant has previously made a request for information similar to this one, it may be that the Applicant is only interested in more recent expenditures. I would encourage both public bodies to contact the Applicant to confirm the time period for which he is seeking this information. It may be, as well, that the Applicant can help to streamline the process further by providing more specifics, based on the records already received by him, as to the information he is seeking. I would encourage the Applicant to co-operate with the public bodies to narrow the request to

that which is absolutely necessary to his requirements. The narrower the request, of course, the easier it will be to put the information together quickly.

As noted earlier in my comments, I would like to commend the public bodies in this case for their efforts to disclose as much information as possible. Despite the fact that they may have missed some information, I am satisfied, based on the volume of records provided and the limited number of edits done prior to disclosure that each of the public bodies acted in absolute good faith in attempting to respond fully and completely to the Applicant without resorting to the use of discretionary exemptions to limit disclosure.

Elaine Keenan Bengts
Information and Privacy Commissioner