

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 09-049

October 5, 2009

Review File: 09-173-5

BACKGROUND

On June 3, 2009, I received a request from a lawyer on behalf of AB to review what they felt was a failure on behalf of the Department of Justice to disclose to them certain records about AB. The lawyer had been retained by AB to assist him in making a claim under the Residential Schools settlement. As part of that claim, they are required to collect and provide numerous mandatory documents including counseling records, medical records, education records, criminal records and corrections records. The lawyer indicated that they had made a request for corrections records through the Nunavut Department of Justice.

In their first letter to the Department, dated in February of 2009, the lawyer included a written authorization from AB directing the Department to release his personal information to the lawyer. This letter made no reference to the *Access to Information and Protection of Privacy Act* and, it appears, it was not treated as a formal Request for Information under that Act by the Department.

There appears to have been considerable discussion back and forth between the lawyer and the Department in an effort, on the part of the public body, to fully respond to the request. At some point, both the public body and the lawyer began to treat the matter as a formal request under the Act. It is unclear to me how or when in the process that happened, but both parties seem to have accepted it as a formal request under the Act and eventually, began to treat it as such. This is important only in that I have no jurisdiction to review a matter if it is not in response to a formal request under the Act.

In the Request for Review, the Applicant indicated that their request had been “denied on the basis that our information provided was insufficient”. As I understand it, the lawyer felt that he had provided sufficient information to identify the records required and that the department’s request for more details was, in effect, a refusal to disclose.

It appears that no records have been found with respect to AB’s incarceration in Nunavut.

ISSUES

There appears to be only one real issue in this case, that being whether the public body, in this case, complied with section 7(1) of the *Access to Information and Protection of Privacy Act*. Section 7(1) reads as follows:

The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay

THE PARTIES POSITIONS

The public body, in its response to me, outlined the steps they had taken to find the records requested. It is their position that they have made more than reasonable efforts to assist the Applicant and his client.

The public body indicated firstly, that they were initially dealing with the request as an informal request, rather than as one being made under the *Access to Information and Protection of Privacy (ATIPP) Act*. Because they are receiving a large number of similar requests in connection with residential school claims, they have been dealing with all of these requests without requiring a formal request under the Act. They say that there were numerous calls between themselves and the lawyer to clarify and sort out the information which was being requested. Because the initial request did not

contain a lot of information and, in an attempt to deal with the matter quickly and efficiently, they called and requested more details. Because the information being requested was quite dated (1978/79) and because of the added complication that the information in question pre-dates the division of the Northwest Territories and Nunavut, they were looking for more specifics. They say that the request was never cancelled or refused and, in fact, at the time they were responding to the Request for Review, they were still searching for the documents. They listed the steps they had taken:

- a) they had contacted the Systems Manager for C.O.M.S who told them that they would have to contact the Director of Corrections in the Northwest Territories and seek the information through NWT archives
- b) they spoke with the Director of Corrections to discuss whether there was a prison in Iqaluit in the 1970's and whether it was called Baffin Correctional Center (B.C.C.) at that time, and received an affirmative answer to both questions
- c) they spoke to an individual who had worked at B.C.C. as Superintendent prior to division in order to get information on the history of B.C.C. The information gathered included where inmates at B.C.C. came from and the types of services provided;
- d) they spoke to the Manager of Records Management for the GN who provided a listing of inmates and the dates they served time at B.C.C. Two inmates had the same surname as AB, but with different incarceration dates than those indicated in the request. They were trying to confirm whether or not the person or persons on the list was AB or some other person with the same or a similar last name
- e) they contacted an individual in Records Management from the Government of the Northwest Territories (GNWT) and the ATIPP

Manager for the GNWT who advised them that B.C.C. inmates records were not transferred to Yellowknife following division and that those records should be at Nunavut's Corrections Services or archived at Nunavut's records warehouse.

- f) they then went back to the Manager of Records Management and asked her to review the files to determine, based on the new information received, if she could find anything further.
- g) the Director of Court Services Division advised them that they maintain records from the Nunavut Court of Justice only since April 1, 1999. Prior to that, they had Territorial Court records only (not Supreme Court records) which were all maintained in Yellowknife prior to division.
- h) they contacted the municipality that AB came from to see if they might have any records that might assist
- i) they contacted the Yellowknife Court Registry and asked them to do a search to see if AB's name appeared in their records and they were told that they could not find AB's name.

The Applicant's lawyer was unhappy with this response and basically went through each of these steps pointing out that although it appeared that a lot of people had been contacted, it was not clear whether there had been any follow up and no details had been provided about how extensive those searches had been in attempting to locate the requested records. They felt that corrections records were of the variety that their previous and enduring existence should not be in doubt. They felt, therefore, that it was reasonable to expect that the Department of Justice would have to go to considerable lengths to locate the records before they could be considered to have "made every reasonable effort" to find them. They asked that "all of the potential locations which had been identified be thoroughly and comprehensively searched". The lawyer also asked

for “any additional location that may be identified in the process be equally searched”. At this point they also raised the issue of the time limit for responding which, for a formal Request for Information made under the Act, would be 30 days.

In response to the matters raised by the Applicant’s lawyer, the public body took the position that the efforts they had made to assist the Applicant in this case did meet the “every reasonable effort” test. In fact, they say, they went beyond their jurisdiction to see if they could find these records in the Northwest Territories where, of course, they do not have authority or jurisdiction to demand anything. They continued to look for records even after the Applicant sought a review under the ATIPP Act. They provided further details about the way in which the searches were undertaken and the results obtained. The public body also pointed out that although the Baffin Correctional Centre existed long before division, it did not exist in its current form until 1986 when it became a single building capable of permanently housing inmates. Prior to that date, the prison was a grouping of three small trailers where low risk offenders were housed. All sentenced inmates were sent to Yellowknife and all remands were left in R.C.M.P. cells until their cases were dealt with.

DISCUSSION

While I understand the frustration of the Applicant’s lawyer in this case, I am not terribly surprised that the public body, after looking in as many places that they could think of, were not able to find the records that the Applicant is seeking.

Public bodies have the obligation to make every reasonable effort to assist an applicant. In this case, I am satisfied that the public body did make that effort. Unfortunately, notwithstanding that effort, no records were found. The fact that no records were found causes me much more concern than the efforts made to find those records.

I can think of a number of reasons for the difficulties, most of which relate to the fact

that the records requested are some 30 years old. This predates the use of computers for every day storage of data and represents a time when records management in the north was less than stellar. Furthermore, the records pre-date the division of the Northwest Territories and Nunavut, which is a further complication. I am aware that there were protocols in place for the transfer of records at the time of division, but it would not surprise me to learn that there were some hiccups and difficulties in terms of identifying and properly labeling records at the time.

The Applicant was unable or unwilling to provide more specific information which might have assisted the public body to focus its searches, and enable it to respond more quickly. It may have helped, for example, if the Applicant could have indicated the kind of offence that he had been charged with or whether his case had been heard in the Territorial Court or the Supreme Court. Perhaps the Applicant's stay in jail was in remand awaiting a court hearing, in which case the records being sought might be in the possession of the R.C.M.P., where remands were housed in those days, and not with the Department of Justice at all. R.C.M.P. records are, of course, under federal jurisdiction and beyond the ability of the public body to access.

Although in this case the public body attempted to look for court records both in Nunavut and the Northwest Territories, court records are not properly the subject of an ATIPP request. Section 3 of the Act specifically excludes court records from the Act as follows:

3. (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (a) a record made from information in a court file, a record of a judge of the Nunavut Court of Justice or of the Court of Appeal, or a record of a justice of the peace;

.....

- (f) a record made from information in a registry operated by a public body where public access to the registry is normally permitted.

Quite apart from the specific exclusion set out in section 3(1)(a) for court records, such records are also public records and the public has access to those records. The Act, therefore, does not apply. Notwithstanding that, it appears that the public body attempted to locate court records in both the Northwest Territories and Nunavut. No records were found.

There are other issues that neither of the parties addressed, which nonetheless occurred to me while conducting my review. For instance, was the Applicant known by any other names than the ones provided and, if so, were those names provided to the public body and/or searched. Another question I would ask is whether alternative spellings for the Applicant's last name might have been tried. There have been many instances in which Inuit names in particular have been misspelled. Is it possible that the records have been disposed of in the normal course of things under the Government's records management policy? If that is a possibility, is there a list of records that are destroyed from time to time? Are these the kinds of documents which may, after all this time, have been formally archived and, if so, have those archived documents been searched? In order to answer these questions, however, the assistance and co-operation of the Applicant and/or his lawyer will be required. I would encourage the Applicant in this case to continue to work with the public body to make sure that every possible avenue has been taken. That said, it is possible that the records requested simply do not exist at this point in time.

SUMMARY AND RECOMMENDATION

Sometimes, despite best efforts, records cannot be found. That is a failing of the records management system and should not happen. The Applicant in this case is quite right when he suggests that it seems obvious that the existence of incarceration

records, even old ones, should exist. There is, however, the possibility that the Applicant is simply mistaken about his time in jail. It may be, for example, that he was remanded after being arrested and held for a month in cells before his case was heard, in which case, there would be no records of his incarceration at BCC. Unfortunately, persons dealing with the criminal justice system do not always understand what the system is doing to them or how the system works. All they know is that they are being held. Or it may be that the records are, unfortunately, just lost. It shouldn't happen, but it does, particularly when we are dealing with dated records in a remote northern community. In this case, it is impossible to say why the records have not been found.

I am, however, satisfied that the public body used every reasonable effort to discover the records requested notwithstanding that no records have been discovered.

I am fully aware that the Government of Nunavut is dealing with a large number of requests for information from individuals making claims as a result of the residential schools settlement and that these issues may well come up again. I would, therefore, make the following recommendations, by way of guidelines for both Applicants and public bodies.

Firstly, I would strongly recommend that public bodies deal with these requests as though they have all been made under the *Access to Information and Protection of Privacy Act*. There are several reasons for this, not the least of which is that the Act provides for a process, including a time frame and a review and appeal process. Although I appreciate and applaud the public body in this case for attempting to deal with these matters on a more informal basis, that can lead to the confusion that arose here. In this case both parties were willing to deal with the review on the basis that it was a request that had been made under the Act and that the rules applicable under the Act, therefore, applied, but it is clear that that is not the basis upon which the public body undertook to respond to the Applicant. At the very least, a letter should be written to applicants in such circumstances advising them that they have a choice to either proceed under the ATIPP Act or on a more informal basis, and explaining the difference

in the procedures and possible consequences. Whether or not the matter is handled as a formal request, the public body will still always have to vet any records identified as being responsive and ensure that nothing is disclosed that should not be.

I would also recommend that for those public bodies who are dealing with a lot of requests for documentation relating to residential school abuses, it would be a good idea to put together a comprehensive questionnaire which can assist Applicants to supply as much information as possible so as to ensure that the public body has as much information as possible to work with, including information Applicants might not think of providing otherwise, such as aliases and other names under which the records might appear, the specific community in which the individual was incarcerated (so, for example, if the individual had been jailed in Cape Dorset, it would be clear that this was not a sentenced inmate, as there is no jail in that community). This questionnaire could also include suggestions to Applicants as to other places where they could look to obtain the information they are seeking. For instance, the document could refer applicants to the Court Registries in both Nunavut and the Northwest Territories and perhaps to the R.C.M.P., particularly as none of these entities fall under the ATIPP Act.

In regard to actual court records, although the public body in this case did try to find court records, this is beyond the scope of a normal search under the Act, as noted above. Furthermore, although the Applicant's lawyer appears to feel that the public body was obligated to go beyond the borders of Nunavut to discover the records, they of course have no jurisdiction beyond their borders. If the Applicant thinks that there may be records with respect to his client in the Northwest Territories, he should make a separate Request for Information to the appropriate authorities in the Northwest Territories. In this case it seems to me that the public body went above and beyond their obligations in contacting the authorities in the Northwest Territories in an effort to discover where the records might be.

Because I know that public bodies in Nunavut have been dealing with a large number of requests of this nature, I am assuming that the questions which I raised in the last

paragraph of the Discussion section of this review have been addressed by the Department of Justice in this case. If not, I would recommend further follow up in this regard. To that end I would encourage the Applicant lawyer to work with the public body and to provide as much information as is available so that all possibilities can be fully canvassed before reaching the conclusion that the records being sought simply have never existed or no longer exist.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner