

# NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 11-052  
March 28, 2011

Review File: 10-181-5

## BACKGROUND

On November 24<sup>th</sup>, 2010, I received a request from an individual asking me to review the negative response which he received to his request for information. In particular, the Applicant had asked for :

sections of the briefing binder given to Tagak Curley upon his take over of ministerial responsibility of the Nunavut Housing Corporation that pertain to the following:

- The Nunavut Housing Trust
- The Affordable Housing Initiative
- Canadian Mortgage and Housing Corporation
- The overall financial situation at the Nunavut Housing Corporation

The Applicant was also seeking e-mails and other written communication between Minister Tagak Curley and/or his staff and Nunavut Housing Corporation President Alain Barriault between July 1<sup>st</sup> and September 28<sup>th</sup>, 2010 on the same four subjects.

The public body refused access to any of the responsive records on the basis of section 14 (1)(a) and (b).

## SECTION 14

Section 14 of the *Access to Information and Protection of Privacy Act* provides public bodies with the discretion to refuse to disclose records which constitute advice to officials. The specific parts of that section which the public body relies on this case read 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;

It is to be noted that this is a discretionary exemption, not a mandatory one. I have taken the position in previous recommendations, and repeat that position here, that where a discretion is given, the public body must actively exercise that discretion and provide the Applicant with an explanation which clearly sets out the factors that the public body used in exercising that discretion.

It is also to be noted that it has been clearly established as a result of litigation up to and including the Supreme Court of Canada that disclosure should always be the default position and that exceptions to disclosure should be narrowly applied. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, Justice Lamer made the following observation:

The appellant correctly points out that under the *Access to Information Act*, access is the general rule. It is also true that exceptions to that rule must be confined to those specifically set out in the statute and that the government has the burden of showing that information falls into one of these exceptions.

## **THE PUBLIC BODY'S POSITION**

I asked the public body (in this case the Nunavut Housing Corporation) to provide me with a detailed explanation outlining the specific sections of the Act relied on for their refusal to disclose any information, as well as a detailed explanation as to the reasoning that went into the exercise of the discretion afforded to the public body pursuant to section 14.

In their submissions to me, the public body indicated:

We have relied on section 14(1)(a) primarily as the nature of [the Applicant's] original request related to the principles of cabinet confidentiality and proper government that we believed to be protected by section 14.

In response to my request that they provide an indication of the factors which they considered when exercising their discretion to refuse disclosure, they made the following submissions:

The underlying premise for Mr. Brown's position was that briefing notes for the Minister are clearly meant to provide:

- a) advice, proposals, recommendations, analyses or policy options developed by or for the public body or a member of the Executive Council

The public body candidly admitted that no effort was made to provide edited or severed records because their interpretation of section 14 as set out above brought all of the records under the exemption.

## **THE APPLICANT'S POSITION**

The Applicant takes the position that, although some of the materials contained in the records requested may be subject to a discretionary exemption pursuant to section 14, it was not reasonable to believe that every sentence is covered by the exemption provided for in section 14 of the Act.

## **THE RESPONSIVE RECORDS**

The public body has identified 15 Briefing Notes as responsive to the Applicant's request. They have not identified any e-mails or other correspondence. There are a total of 78 pages included in the package of responsive documents.

## **DISCUSSION**

As a preliminary comment, I would refer to section 5(2) of the *Access to Information and Protection of Privacy Act* which provides as follows:

- (2) The right of access to a record does not extend to information excepted from disclosure under Division B of this Part, **but where that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.**

It is, therefore, inappropriate to apply a blanket exemption to any one record, let alone a series of records comprising a total of 78 pages. Each record must be examined from beginning to end and only those parts of it which fall squarely within any exemption should be redacted. It may be that the only thing left on the page is a date or a title, but to the extent that it does not fall within the exemption, it should be disclosed.

In order to qualify for an exemption under section 14(1)(a), the information in the records must constitute “advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council”.

The ordinary dictionary meaning of these words is, I think, important in the context of this review. The Oxford English Dictionary provides the following definitions:

advice:	guidance or recommendations offered with regard to prudent action:
proposal:	a plan or suggestion, especially a formal or written one , put forward for consideration by others:
recommendations:	a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body:
analyses:	detailed examination of the elements or structure of something
policy options:	a course or principle of action adopted or proposed by an organization or individual / a thing that is or may be chosen

In other words, the records must contain guidance, options, suggestions for direction, or possible choices of options in order to be protected pursuant to section 14(1)(a).

In Order F2004-026, issued on September 18, 2006, the Alberta Information and Privacy Commissioner made the following comments with respect to section 24 of the Alberta Act which was at that time almost identical to our section 14:

Earlier decisions of this office have considered the circumstances under which the criteria in these provisions apply. Order 96-006 said that to determine if section 24(1)(a) [then section 23(1)(a)] will apply to information, the advice, proposals, recommendations, analyses or policy options ("advice"), should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action.

In the same Order, the Information and Privacy Commissioner accepted that the purpose of this exemption was to "allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions" and that "the Head should exercise the discretion to withhold documents where disclosure would defeat the purpose of this section."

I have had the benefit of being able to review the documents identified as being responsive to the Applicant's request. They are "Briefing Notes" which, for the most part, appear to be informative in nature, outlining steps and decisions already made. In my opinion, most, if not all of the responsive records meet the first and the third requirements of section 14 as set out above. Very little contained in the records, however, is "directed toward taking an action". The contents of the records are informative in nature only. They contain, for the most part, facts and figures, in some cases an explanation for choices and decisions already made and some projections and forecasts. There is no suggestion that any actions or even discussions are expected or intended to arise out of these Briefing Notes. There is nothing in these records which is intended to "allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions". Rather, for the most part they outline information about the current state of affairs, and an indication of decisions already made and, for the most part, implemented.

I have attached to this recommendation a list of the very limited portions of the responsive records which properly fall under the definition of advice, proposals, recommendations, analyses or policy options. These portions of the records are subject to a discretionary exemption. Other than these small tidbits, there is nothing in any of the records provided that can be described in any way as "advice, proposals, recommendations, analyses or policy

options". As a result, section 14(1)(a) does not apply to create an exemption, discretionary or otherwise for most of the records. I therefore recommend that all of the records be disclosed to the Applicant, subject to a review of those portions of the records listed in the attached appendix.

Even if section 14(1)(a) did provide for a discretionary exemption, it is quite clear in this case that no discretion was exercised. The public body indicated that as soon as they decided that the exemption applied, they simply refused to disclose any of the records at all, without looking at them to consider whether or not there were any parts of the records that might fall outside the exemption. Not only must discretion be actively exercised with respect to each individual record subject to a discretionary exemption, the rule continues to be that disclosure is the rule and refusals the exception. Moreover, even if it can be said that some of the responsive records might contain advice, proposals, recommendations, analyses or policy options, this does not create a blanket exemption for the entire record. The exemption applies only to the advice, proposals, recommendations, analyses or policy options. There must be a page by page, line by line analysis done.

As a final comment, in reviewing these records, it appears that the only things identified as being responsive are briefing notes. There is no e-mail or other correspondence included in the package of responsive records. I am left to conclude that there were no responsive records that fell under the "correspondence" heading and I find this somewhat of an anomaly.

## **RECOMMENDATIONS**

In light of the above discussion, it is my opinion that most of the records identified as being responsive to the Request for Information contain no advice, proposals, recommendations, analyses or policy options and, therefore, do not attract the protection of section 14(1)(a) of the *Access to Information and Protection of Privacy Act*. I therefore recommend that the entire package be disclosed to the Applicant, with the exception of the items listed in the Appendix which is attached to this report. These small sections do include what one might consider to be advice or recommendations and relate to matters not yet implemented. For these, I recommend that the public body exercise their discretion and determine whether or not to disclose those sections to the Applicant. If they choose not to disclose those sections, the Applicant should be provided with an explanation as to why the public body has chosen to exercise their discretion in favour of non-disclosure.

I further recommend that the public body undertake a further search to determine whether there are any other communications (e-mail or letters) which are responsive to the second part of the Applicant's request. If, in fact, there are additional responsive records, I recommend that they be reviewed and disclosed to the Applicant in accordance with the Act.

**Elaine Keenan Bengts**  
**Nunavut Information and Privacy Commissioner**

## APPENDIX

Title: Capital Budget 2010/11  
Issue: Breakdown of NHC's Capital Estimates 2010/2011  
Subject to Exemption: The figures not yet approved (page 1)

Title: Main Estimates 2010/11  
Issue: Breakdown of NHC's Main Estimates 2010/2011  
Subject to Exemption: The figures not yet approved (page 1)

Title: Cambridge Bay Housing Association (CBHA) Financial Situation  
Issue: CBHA is in a deficit in the amount of \$1,445,304.00 as of March 31<sup>st</sup>, 2010  
Subject to Exemption: Last bulleted point under the heading "Speakers Notes" (page 1)  
Three bulleted points on the top of page 2