

# NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 12-059  
July 23, 2012

Review File: 12-142-5

## **BACKGROUND**

In March of this year, I received a request from a member of the media to review the response he had received to a request for a copy of the Business Case Study for the Nunavut-Manitoba road, and any subsequent reports or studies that might pertain to that project. The Applicant first requested the information on or about September 1<sup>st</sup>, 2011. At that time, the public body cited Section 25 of the *Access to Information and Protection of Privacy Act* to deny the Applicant access to the record. This section gives a public body discretion to refuse access to a record where the record is otherwise available to the public or where the record "is required to be made available within six months after the applicant's request is received". When the report requested had not been made public within six months from the first request, the Applicant made a second request for the same record. This second request was denied pursuant to section 16(1)(a)(i) of the Act which provides that the public body has a discretion to refuse access to a record where the disclosure could be "reasonably expected to impair relations between the Government of Nunavut and....a province or territory".

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

The public body provided me with a short explanation of their reasons for both the first and the second refusal to disclose the record in question.

With respect to the first request in September, 2011, they indicate that when they responded to the Applicant it was anticipated that the record in question would be released to the public within a six month time frame and that the public body, in good faith, declined to disclose the record as a result. Unfortunately, they add, due to factors outside the control of the Government of Nunavut (which were not specified) the anticipated release date was delayed.

They advise that the business case in question is part of a joint project between the Government of Nunavut and the Government of Manitoba. Work was being done with their

counterparts in Manitoba to coordinate a joint release date. The relationship between the Government of Nunavut and the Government of Manitoba is governed by a Memorandum of Understanding between the two governments entered into in 2010. The MOU establishes a committee, co-chaired by delegates of the Premiers of the two governments, responsible for coordinating activities between the jurisdictions, including “exploring the potential for an all-weather road between Manitoba and Nunavut”. It is their submission that:

A preemptive release of this information outside of the process and spirit of the MOU would be harmful to our relationship with the Government of Manitoba

No further details were provided.

## **DISCUSSION**

As always, there is a benefit to reviewing the purposes of the *Access to Information and Protection of Privacy Act* when entering into a review of a decision to refuse disclosure of any record held by the Government of Nunavut.

Section 1 of the Act provides that:

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;
  - ...
  - (c) specifying limited exceptions to the rights of access;

The rule under this legislation is that all records are available to the public unless they fall within one of the specified and limited exceptions outlined in the Act. Furthermore, section 33 of the Act provides that the onus of establishing that an exception applies lies squarely on the public body seeking to refuse access:

33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

In the first instance of the public body's refusal to provide a copy of the requested records to the Applicant, they relied on section 25 of the *Act* to justify the refusal. That section provides as follows:

25.(1) The head of a public body may refuse to disclose to an applicant information that is otherwise available to the public or that is required to be made available within six months after the applicant's request is received, whether or not for a fee.

A careful reading of this paragraph will show that, in order for this exception to apply to allow the public body to refuse disclosure of a record, there must be a **requirement** that the record is to be made available to the public within six months after the applicant's request. In this case, there may have been an intention to make the report available, but there was no **requirement** to that effect. While the public body says (and I have no reason not to believe) that they were, in good faith, working toward the public release of this record, there was no legislation or other directive that required them to release the record within the stated time frame. There are, in fact, very limited circumstances in which this section will justify a refusal to disclose. This was not one of those circumstances. The section did not provide the public body with a viable exemption to disclosure.

Rather than ask this office to review that decision, however, the applicant chose to wait and request the same document again after the six month period had passed. This time, the public body refused disclosure on the basis that its disclosure would impair its relationship with the Government of Manitoba. The relevant section of the *Act* in this regard is section 16, the relevant portion of which reads as follows:

16.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to

- (a) impair relations between the Government of Nunavut and any of the following or their agencies:
  - (i) the Government of Canada or a province or territory

It is to be noted that the section requires a "reasonable expectation" that there will be an impairment of relations between the two governments by the disclosure of the record in question. It is not sufficient for the public body simply to state it as a fact. The onus is on the public body to establish that exception applies and they must, therefore, be able to give me something more than a simple statement that an impairment of relations will occur. In Alberta, the Information and Privacy Commissioner has established a test (Order 96-003) to determine when there is a "reasonable expectation" of harm by the disclosure of information. The party who is asserting the claim must provide **objective evidence** of three things:

- a) there must be a clear cause and effect relationship between the disclosure and the harm;
- b) the disclosure must cause harm and not simply interference or inconvenience;
- c) the likelihood of harm must be genuine and conceivable.

In Order F2006-006 Alberta Information and Privacy Commissioner's Office also considered what must be established for the exception in their section 21(1)(a), which is identical to our section 16(1)(a), to apply:

The fact that the Public Body's relationship with the local government body is critical, and that the latter provides vital information, may establish the importance of the intergovernmental relationship, but it does not establish a reasonable expectation of harm to that relationship if information were disclosed. Under other sections of the Act, the "harm" test requires a clear cause and effect relationship between the disclosure and the alleged harm, the disclosure must cause harm and not simply interference or inconvenience, and the likelihood of harm must be genuine and conceivable

What I'm missing here is any objective evidence of the public body's assertion that the relationship between the two governments would be impaired by the disclosure of this record. The Memorandum of Understanding makes no reference to confidentiality or the protection of the records produced by or for the committee. There is nothing in the record itself which

suggests that it is intended to be confidential. I have nothing to suggest that the Government of Manitoba would be in any way concerned about the disclosure of the record. Although the study might have been jointly commissioned, I have been provided with nothing which suggests that one of them cannot disclose it without the consent of the other. There may be informal protocols in place to deal with these kinds of things, but I was not provided with any reference to such a protocol or written policy. The public body involved does not appear to have consulted the Province of Manitoba about how they felt about a disclosure of the report/business case. For all I know, the report has already been published in Manitoba. All I have is an unsubstantiated statement that the disclosure would impair relations between the two governments.

Simply put, the public body has not provided me with any objective evidence whatsoever upon which I can conclude that the disclosure of this report would be “reasonably expected” to impair intergovernmental relations. Nothing at all. Without that objective input, the public body simply has not met the onus of establishing that the exception contained in section 16 applies so as to entitle them to use their discretion not to disclose the record.

Before leaving this topic, I note that the Applicant requested not only a copy of the Business Case, but that he also requested “any subsequent reports or studies that pertain to that proposed project”. There has been no mention in the public body’s response either to myself or to the applicant about whether or not any additional records have been identified as being responsive to this request. Section 7 of the *Act* requires public bodies to “make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay”. In my review of the materials, I cannot conclude that the public body has responded completely to the request for information, as there has been no indication whatsoever given as to whether or not any other records responsive to the request for information exist or have been identified.

## **SUMMARY AND RECOMMENDATIONS**

In summary, the public body in this case simply has not met the onus of establishing that either section 25 or section 16 apply such as to exempt the report requested from disclosure. As a result, I recommend that the record be disclosed. I further recommend that the public body

complete this request by providing the Applicant with any other documents which are responsive to his request for information, subject only to any relevant and applicable exemptions.

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