NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 12-060
December 18, 2012

Review File: 12-162-5

BACKGROUND

The Applicant in this case is the Nunavut Employee's Union (NEU). Some time in February or March of this year, NEU made a request addressed to "all departments, agencies and crown corporations of the Government of Nunavut". The request was for

> All documents, manuals, directives and documentation relating to the administration of strikes, work actions, work disruptions, work stoppages that were developed for the use of employees; department heads; senior and middle managers.
>
> ....in short, I would like any document that relates to the conduct of employees and managers in strike and pre-strike situations in the Government of Nunavut

Because the request was so wide, the Department of Executive and Intergovernmental Affairs (EIA) took responsibility to respond to the Applicant on behalf of all public bodies except for one, whose employees were not part of the same bargaining unit as the majority of public bodies. The Request for Information was forwarded to that public body (Quilliq Energy Corporation) for a separate response from that entity. This Request for Review relates only to the response from EIA.

It is to be noted that at the time that the request was made, the NEU had been vocal about their intention to enter into a strike and had been notifying their members that a strike would likely happen in the month of May.

In responding to the Request for Information, the Government of Nunavut indicated that they had identified two types of records that were responsive to the Request for Information:

1. The Guidelines for Strike Preparedness for the Government of Nunavut (the "Guidelines"); and
2. Departmental contingency plans (the Contingency Plans).

In their letter to the Applicant the GN indicated that they would not be disclosing any of the identified records. They relied on Section 25 of the *Access to Information and Protection of Privacy Act* to deny access to the Guidelines, indicating that the document "will be made available to the public within six months" on the GN website. The Departmental Contingency plans were being withheld pursuant to Section 17(1)(c)(iii) of the Act.

The Applicant union asked this office to review the refusal. They indicated that the information requested was "needed to assist the Union in preparing members in the event of a strike" and to investigate allegations that union members were being denied legitimate annual leave as a result of the strike preparations being made by the GN.

THE RELEVANT SECTIONS OF THE ACT

Section 25 of the *Access to Information and Protection of Privacy Act* provides as follows:

> (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.
>
> (2) Where the head of a public body refuses to disclose information under subsection (1), the head shall inform the applicant where the information is or will be available.

Section 17 of the Act provides public bodies with a discretion to refuse access to records where that refusal could be reasonably expected to harm the economic interests of the Government of Nunavut or a public body. More specifically, section 17(1)(c)(iii) provides:

> (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm

the economic interest of the Government of Nunavut or a public body or the ability of the Government to manage the economy, including the following:....

(c) information the disclosure of which could reasonably be expected to...

(iii) interfere with contractual or other negotiations of, the Government of Nunavut or a public body;

It is noted that both of these sections are discretionary in nature. This means that, if they apply, the Government must exercise its discretion in deciding whether or not to disclose the information in question and must provide some indication of the reasoning that went into the exercise of that discretion.

THE GOVERNMENT'S POSITION

With respect to the Guidelines, the public body argued that these documents are an instructive document that provide direction to senior managers and excluded employees in the event of a strike. Once a strike is called, these documents would be issued to excluded employees and senior managers, at which point the Government would be required to make the document public under section 71 of the *ATIPP* Act. Section 71 provides that:

71.(1) The head of a public body shall make available to the public, without a request for access under this Act,

(a) manuals, instructions or guidelines issued to the officers or employees of the public body, and

(b) substantive rules or policy statements adopted by the public body, for the purpose of interpreting an enactment or administering a program or activity that affects the public or a specific group of the public.

The government argued further that the Guidelines in no way affect the rights or work functions of NEU members in the event of a strike. Rather, they only address GN employees who are excluded from the NEU. Further, they indicated that the Guidelines had not been issued to senior GN managers or any other GN employees for implementation at the time of the request

and were not, therefore, being used to deny employees legitimate annual leave. Further, they indicated that the GN had concerns that the release of this document would further signal to the NEU members that the GN was prepared for and leaning toward a strike, which would cause undue harm and stress to NEU members who wished to see the negotiations resolved without a strike.

With respect to the Contingency Plans, the public body indicated that these plans list the requested essential services for all public bodies in the event of a strike, including specific position numbers and the essential services they provide. The positions listed, however, were tentative as the Department of Human Resources was still negotiating the "Essential Services Agreement" with the NEU. As the Agreement had yet to be finalized, the essential services listed in the Contingency Plans were not yet official and, they argued, releasing this information before it was official would have a negative impact on negotiations of the Essential Services Agreement. They argued that if NEU had the information in the Contingency Plans, the union would have an unfair advantage in that they would be able to strike in offices or locations based on the Contingency Plans and therefore leave some offices more vulnerable than others.

THE NEU POSITION

The NEU, in their response to the submissions received from EIA indicated that, in their opinion, "there is insufficient evidence to establish that its ATIPP request would only yield two types of records". As a preliminary matter, therefore, they requested a 'confirmation' that the Department only found two types of records.

With respect to the application of section 25 to the Guidelines, the NEU argue that the government's position is not sustainable. In particular, they took the position that section 71 of the Act supports their position that the record must be disclosed. Furthermore, they say that section 25 does not apply as this record is not "otherwise available to the public", nor is there any legal obligation to "make them available within six moths".

The union relied on the decision in *Savik Enterprises et al. v. The Commissioner of Nunavut and Arctic Co-operatives Ltd.* 2004 NUCJ 04, in which the Nunavut Court of Justice was tasked with determining what access, if any, the plaintiffs should have to successful proposals for fuel

contracts that had been submitted to the Government of Nunavut. They point out that while the decision did not involve the application of the *ATIPP Act*, the Court did consider the purpose of the Act, noting the following:

> This legislation maintains a precarious balance; a balance between the need to protect and preserve privacy interests on the one hand, with the need to promote accountability of public bodies through enhanced access to certain types of information, on the other.

The union argues that the interests of the public and the union are ill-served by public bodies which arbitrarily withhold information.

With respect to section 17(1)(iii), the union argues that this section cannot be relied upon without a solid evidentiary foundation. They argue that the Department must link the economic harm that could reasonably be expected to flow from the disclosure. In this regard, they refer to and rely on a recommendation made by the Newfoundland Information and Privacy Commissioner's Office in March, 2012 (Recommendation A-2010-002) in which the Commissioner noted that the test that must be met for the analogous section in Newfoundland to apply:

> In order to establish that information may be withheld under subsection 24(1), the Department must not only state what types of harm it alleges can reasonably be expected to result from the disclosure, it must also provide convincing evidence of how this is likely to occur.

The NEU asserts that the government has not provided any evidence to link financial or economic harm to the disclosure of the requested information.

THE GOVERNMENT'S RESPONSE

The government was given the opportunity to respond to the arguments made by the union. They took that opportunity to make the following points:

a) with respect to the application of section 71, and whether the public body was required by that section to disclose the information requested, they point out that the section only applies to manuals, instructions and guidelines “issued” to the officers or employees of a public body and reiterates that, at the time that the Request for Information was made, the Guidelines had been prepared in anticipation of a possible strike, but had not yet been issued to senior managers or any other GN employee and that the section did not apply until the Guidelines were issued;

b) with respect to the suggestion that not all responsive records had been identified, the government indicated that they were confident, based on their interpretation of the ATIPP request received, that they had identified all of the responsive records. They did suggest, however, that if the union wanted to discuss the scope of the request, they were willing to do that;

c) the GN reiterated its concerns that the release of the Guidelines at the time of the original request would further signal to NEU members that the GN was prepared for and leaning toward a strike, which would cause undue harm and stress to the NEU members who wished to see the negotiations resolved without the need for a strike. They did, however, advise that the union and the government had since reached an agreement and, as a show of good faith, they were willing to disclose the Guidelines and would arrange with the union to do that, even though they are still in draft form and have not yet been issued to any GN employee;

d) with respect to the Contingency Plans, the government reiterated its position that the disclosure of these documents would give the union an unfair advantage in the event of a strike, enabling them to determine their strike plans based on the vulnerabilities listed in the Contingency Plans, highly compromising the GN’s ability to provide essential services to Nunavummiut and putting further pressure on the GN to accept a deal from the NEU that would not be in the best interests of the GN or Nunavummiut.

DISCUSSION

It should be noted that the union was given the opportunity to respond to the GN's final submissions but they chose not to do so. It should also be noted that, as Information and Privacy Commissioner, I was provided with copies of all of the responsive records so that I could assess for myself whether and how the claimed exemptions might apply.

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 this case, I agree with the union that section 25 of the *Act* did not apply to the public body's refusal to disclose the Guidelines. In order for this section to apply, there must be a **requirement** that the information is to be disclosed within six months. In this case there may have been an intention to disclose it, but the government did not provide me with any authority to indicate that there was a requirement to disclose the record. There are, in fact, very limited circumstances in which this section will justify a refusal to disclose. This was not one of those circumstances.

On the other hand, I agree with the government in their interpretation of section 71. If the Guidelines had not yet been "issued", section 71 does not apply. I further agree with the government that when the Guidelines did issue (i.e. when or if a strike took place) there would have been an obligation on the government to disclose them at that time.

As the public body has since decided to disclose this record, I do not propose to consider whether there might be other provisions in the Act which might apply to the disclosure of this record. This record has now been disclosed (in draft form, which is the only form in which it existed at the time of the Request for Information).

Moving on to the Contingency Plans, I have, as noted, been able to review these records so as to be able to better assess the position of the government. In this case, the government advises (and this is not disputed by the union) that the Contingency Plans of each of the departments were 'draft' only because the main Essential Services Agreement had yet to be finalized with the union. I fully appreciate that, with the union calling for a strike of its members, it was not only expedient but necessary for each public body which might be affected by such a strike to make plans to maintain essential services. It would have been irresponsible for them not to make such preparations. That said, their "plans" could be contingent or draft only in light of the fact that there had not yet been an agreement on what the essential services would be in the event of a strike.

The union is quite right when they say that in order for section 17 to apply, the public body must be able to establish, based on some objective basis, that there is a "reasonable expectation" that the economic interests of the GN would suffer if these records were to be disclosed immediately prior to a strike. In Alberta, the Information and Privacy Commissioner has established a test (Order 96-003) to establish 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 this case, notwithstanding the union's argument to the contrary, I am satisfied that the GN has, in fact, provided sufficient background and information upon which the reasonable person could conclude that there is a reasonable expectation that the disclosure of the information contained in the Contingency Plans would interfere with the GN's ability to negotiate an agreement with the union. To allow the union access to the Contingency Plans in the face of threatened strike action would be like handing over a battle plan to the enemy prior to the battle. The contingency plans would absolutely reveal vulnerabilities in the various departments, as well as those areas that the GN considered vital to being able to continue to provide the people of Nunavut with minimal services in the event of a strike. In some cases, such as this one, the "evidence" of a reasonable expectation of harm is a matter of logic. There is little doubt that the union would take advantage of the vulnerabilities of the Government's plan in order to influence the outcome of the negotiations...that's what a strike is - a means to an end. Unions will do what they can to tilt the scales in their favour. In fact, their submissions to me indicated that this is exactly what they wanted the records for - to plan their strike action. There is nothing wrong with this. That said, if the Contingency Plans were revealed to the union prior to a strike being called but in the face of a threatened strike, the union would be handed an unfair advantage over the government in the negotiation process and that is clearly something that section 17 seeks to prevent. I am satisfied, on the facts of this case, that the GN was justified in refusing to disclose the Contingency Plans pursuant to section 17 of the Act. What's more, even with the threat of a strike now past, the content of these records is still such that having the information would likely result in prejudice to the competitive position of the GN and it's negotiations with the union in future labour negotiations. In my opinion, the GN was justified in refusing to disclose the Contingency Plans and, until there is an agreement with the union with respect to essential services, they will continue to be justified in refusing to disclose these records. It is clear from the submissions received and from the context that the public body in this case did actively exercise the discretion given to them in section 17 in refusing to disclose the Contingency Plans.

SUMMARY AND RECOMMENDATIONS

In summary, I am satisfied that both the Contingency Plans and the Guidelines were properly withheld from the Applicant at the time that the Application was made.

There was no requirement to share the Guidelines for Strike Preparedness pursuant to section 71 of the *Access to Information and Protection of Privacy Act* at the time of the request for

information because the Guidelines had not yet been issued to any government officials. They were prepared as a contingency but had not yet been issued and were not in force. There is some evidence that the disclosure of that record at the time it was requested could reasonably have been expected to have a negative impact on the Government of Nunavut's ability to negotiate with its union on an even playing field. That said, this record has now been disclosed by the public body and the issue is, therefore, moot.

I am satisfied that the disclosure of the Contingency Plans was justified pursuant to section 17 of the Act. There is little doubt that if the Contingency Plans had been revealed to the union prior to a strike being called but in the face of a threatened strike, the union would be handed an unfair advantage over the government in the negotiation process. Even with the threat of a strike now past, there are good reasons to withhold the record in that the document still holds the floor plan for the government's approach to a strike situation and its disclosure is likely to provide the union with an unfair advantage in any future strike situation.

I therefore recommend that no further action be taken.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner