NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 13-070
December 17, 2013

Review File: 13-123-5

BACKGROUND

The Applicant sought access to information in relation to the circumstances surrounding a medevac flight from a Nunavut community for his critically ill spouse, since deceased, to Edmonton. The Request for Information was drafted in the form of questions:

a) Why did it take so long for a Medevac plane to reach the community?
b) Why did they have to change crews in Yellowknife?
c) Why did it take them so long to reach Edmonton?

The public body responded to the request with only one record - a newspaper report of the incident - and by providing short written answers to the direct questions in narrative form. No other records were provided to support the answers given.

The Applicant was not satisfied with the response received and asked me to review the matter.

THE REVIEW

I asked the Department of Health to provide me with an explanation as to their response. I pointed out that it seemed to me to be unlikely that the Department had no other records of this incident and that, if that was all they had, their record keeping was clearly lacking. I asked the public body to provide me with their responses to a number of questions, including

- a full description of the searches conducted for the records, including both electronic and paper records, with reference to “key words” searched;

- a full explanation as to the policies and processes involved in connection with the call out of a medevac flight, any records from the health centre in the community which related to the treatment provided to the patient in this particular case or which related in any way to the medevac flight;

- any records or reports prepared after the event by way of analysis or review of the call out, including any recommendations for changes to policy/procedures or the assessment of contractual responsibility;

- any documents submitted to the Department or any other government agency by the contracted company in relation to the event, including any invoicing received; and

- any other information deemed by the public body to be relevant.

THE DEPARTMENT'S RESPONSE

Records Search

The public body indicated that in order to respond to the Request for Information, they contacted the community health clinic for clinical records on the dates in question. Fifteen pages were discovered. Those pages were provided to me for my review. None of these records were disclosed to the Applicant.

They also contacted a departmental employee responsible for medevac flights to obtain the medevac records from the contractors in question and discovered 6 pages of records, also provide to me for my review.

Finally, the public body did an electronic search to obtain electronic records, including email correspondence related to the event. Several pages were discovered in this manner and were provided to me for my review. It was pointed out, however, that two of these pages would be wholly exempt from disclosure pursuant to section 14(1)(a) of the *Access to Information and Protection of Privacy Act*. No further explanation was provided as to how that section applied to the content of these pages.

Policies and Procedures for Medevac Flights

For this, the public provided several records, including a two page brochure produced by a third party company outlining generally the process of a medevac situation. They pointed out that,

while the policies and procedures were generally the same, the contact information on this brochure was for a different company than the one involved in the incident in question. They also provided me with Section 8 of the Community Health Nurse Orientation binder, with respect to the process for requesting a medevac from the health center.

Records from the Health Centre

The public body provided me with several sets of records including:

a) handwritten notes made by the nurse in charge on the dates in question,
b) correspondence between medical personnel in the health centre, the Edmonton facility the patient was transferred to, and the Stanton Territorial Health Authority
c) handwritten notes made, apparently, by health personnel in the Edmonton facility;
d) an apparent report of the results of tests done in the Edmonton facility sent to the health centre in the community;

They did not provide me with any indication as to why they did not identify these records as being responsive to the Applicant's Request for Information. Nor did they provide any comment on whether they could be disclosed to the Applicant in light of section 23 of the Act, which I will discuss below.

Records Prepared After the Event

There are two records in this group of records. The first is a two page written summary of what happened in the community health centre, apparently prepared by the nurse in attendance during the event. The second is another two page record, consisting of an email from an individual employed by the Department of Health and addressed to a number of people, none of whom were identified to me. The public body indicates that the entire content of these latter two pages would be withheld from the Applicant pursuant to section 14(1)(a) of the Act. Once again, however, no further explanation has been provided.

Records Received from the Contractors

This group of records includes 6 pages of correspondence between the contractor and the public body with respect to the medevac flight, as reported after the fact. The public body has not provided me with any indication as to what, if any, portion of these pages would/should be disclosed to the Applicant or what, if any, exemptions apply.

Why the public body chose to "answer the questions posed" rather than provide records.

The public body indicated that they received the Applicant's request in the form of questions about what happened on the day of the medevac. They advised that they contacted the Applicant by telephone and asked for a clarification as to whether or not he was seeking documents or merely answers. They asked the Applicant to send that clarification in writing. No written clarification was received, so the public body decided simply to answer the questions posed.

THE RELEVANT SECTIONS OF THE ACT

It is important to begin any review of the *Access to Information and Protection of Privacy Act* with a review the most relevant provisions of the Act in relation to the issues raised. The starting point is always Section 1 which sets out the purposes of the Act:

> 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....

In all cases, disclosure will be the rule and exceptions must be narrowly construed and applied.

The term "record" is defined in section 2 as "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 6 of the Act sets out the process to obtain access to a record. It simply requires a written request to the public body that the person believes has custody or control of the record. Section 5 says that 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. That right, however, is subject to a number of exceptions outlined in Part I of the Act.

Section 14 contains one of those exceptions. Section 14(1)(a) provides that the head of a public body **may** refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council. This is the only exception that the public body referred me to.

Section 23, however, is also relevant. This section prohibits the disclosure of records where the disclosure would constitute an unreasonable invasion of a third party's privacy. A third party is defined as anyone other than the Applicant or the public body. Section 23(2) outlines circumstances in which the disclosure will be presumed to be an unreasonable invasion of privacy including where the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Section 23(3) requires a public body to consider all of the circumstances in determining whether the disclosure of a record might constitute an unreasonable invasion of privacy, and provides a non-exhaustive list of items that should be considered when making that determination.

Finally, the relevant part of section 52 of the Act provides as follows:

> 52. (1) Any right or power conferred on an individual by this Act may be exercised
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> (a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;

DISCUSSION

The first thing that strikes me about this matter is the fact that the public body chose to respond to the Request for Information by answering questions rather than by providing the relevant

documentation. While the Applicant's request was presented as a list of questions, the request was submitted as an Access to Information request under the *Access to Information and Protection of Privacy Act.* The Act clearly contemplates that responses to Requests for Information under the Act are to be in the form of records. While it was helpful for the public body to answer the questions, this is not what the Act directs them to do. In most cases where the public is seeking information from the government under the Act, it's because they want the background documents supporting a government decision, not simply a composed answer to a question. While anyone can ask a public body a general question, and hopefully get a general answer, that does not constitute an ATIPP request or a response to an ATIPP request. The fact that this request was, perhaps, not clearly worded should make no difference. If the request is made with reference to the Act, the obligation of the public body is to respond with all responsive records. This is the default position. An Applicant should not be required to clarify that they want "records" as opposed to "answers". When a request for information is made under the *Access to Information and Protection of Privacy Act*, the request is for records. The only time a simple "answer" will suffice as a response under the Act is when the Applicant clearly and unequivocally agrees that this is all he wants.

This, then, brings us to the records in question.

It appears to me that the public body did not really consider these records in terms of disclosure or what, if any, exemptions might apply, except with respect to two pages of the records created by the public body. These two pages are in the package of records prepared after the event. Because the public body did refer to an exemption provision of the Act with respect to at least some of the records in this package, I will deal with them first.

Records Prepared After the Event

Pages 16 and 17

These pages appear to be notes made by the nurse in the clinic who attended to the patient on the night in question in the community, compiled after the fact, probably at least in part having reference to the patient's chart. Most of what is contained in these two pages is the personal information of the patient, the Applicant's now deceased spouse. Because the information is not the Applicant's own personal information, it is subject to Section 23(1) of the Act which prohibits

the disclosure of third party information (which includes the information of deceased individuals) where that disclosure would amount to an unreasonable invasion of the third party's privacy. There is a presumption raised, in section 23(2), that the disclosure of personal health information will constitute an unreasonable invasion of privacy.

In different circumstances, I would have no trouble finding that the disclosure of this personal health information of a third party would be an unreasonable invasion of the patient's privacy pursuant to section 23(2)(a), resulting in a prohibition against disclosure. Presumptions are, however, rebuttable. The Court of Queens Bench in Alberta in considering this issue in *University of Alberta v. Pylypiuk*, 2002 ABQB 22 (CanLII) commented on the interpretation of similar provisions in the Alberta Act. The Court said:

> In interpreting how these sections work together, the Commissioner noted that s. 16(4) [our section 23(2)] lists a set of circumstances where disclosure of a Affected party's personal information is presumed to be an unreasonable invasion of a Affected party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) [our section 23(3)], and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is (sic) met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

In other words, while a presumption is raised, there may be circumstances in which the presumption is rebutted. The circumstances of this case, in my opinion, are sufficient to rebut the presumption. In the first place, it is to be noted that the Applicant in this case is not only the patient's spouse, but was also present during most, if not all, of the events described in the narrative. Further, if the Applicant can establish that he is the patient's "personal representative" and he is seeking the records in order to take steps on behalf of the estate, section 52(1)(a) would allow him access to these records without any further review. Section 23(3) provides that when determining whether a disclosure of personal information would be an

unreasonable invasion of a third party's personal privacy, public bodies must consider **all the relevant circumstances**, including whether:

a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nunavut to public scrutiny;
b) the disclosure is likely to promote public health and safety;
c) the personal information is relevant to a fair determination of the Applicant's rights.

In my opinion, all of these criteria apply to the information in question in this case to tip the balance in favour of disclosure.

In order to assist me in analyzing the facts of this case, I have reviewed several Orders made by the Information and Privacy Commissioner's Offices in Alberta and Ontario.

In Alberta Order 98-004, the following observations were made:

> The Public Body says that a deceased's privacy rights are circumscribed by two sections of the Act: (1) section 16(4)(i), [now 17(2)(i)] which says that it is not an unreasonable invasion of personal privacy to disclose the personal information of someone who has been dead for 25 years or more; and (2) section 79(1)(a) of the Act, which allows the deceased's personal representative to exercise any right or power that the deceased would have had under the Act, but only if the purpose is to administer the deceased's estate. The Public Body appears to be of the view that a deceased's personal information is not to be disclosed in any other circumstances.
>
> However, the Act does not say that it is always an unreasonable invasion of a deceased's personal privacy to disclose the deceased's personal information before 25 years have passed. In my view, during the period of time from the deceased's death up until 25 years after death, a public body has to determine whether relevant circumstances exist, such that it would not be an unreasonable invasion of the deceased's personal privacy to disclose the personal information.

> In this case, there are a combination of unusual relevant circumstances that weigh in favour of disclosing part of the deceased's personal information…

In Alberta Order 2000-012, the former Commissioner said:

> At this stage, I must consider the nature and quality of the privacy rights of a deceased person who may or may not have received social welfare benefits, and weigh those rights against the relevant circumstances that are asserted by the Applicant.
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> The Act strikes a complex balance between the privacy rights of the dead and the needs of the living. The Act is clear that privacy rights do not end when a person dies. The definition of "personal information" in the Act does not limit the protection of the Act to persons who are alive: it includes all "identifiable persons", whether alive or dead.
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> …
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> Section 16(2)(i) [now 17(2)(i)] of the Act says that where an individual has been dead for 25 years or more, disclosure of personal information would no longer be an unreasonable invasion of a third party's personal privacy under the Act. By implication, this section of the Act extends privacy rights to deceased persons. But such rights are not absolute. In Order 98-004, at paragraph 171, I stated that the Act does not say that it is always an unreasonable invasion of a deceased's personal privacy to disclose the deceased's personal information before 25 years have passed from the date of death. During that 25-year period, a public body has to determine whether relevant circumstances exist, such that it would not be an unreasonable invasion of the deceased's personal privacy to disclose the personal information.

In Alberta Order F2011-001, the following comments were made:

> In my view, section 17(2)(i) acknowledges that some privacy interests may continue after the death of an individual, but that any such interests end, absolutely, after 25 years. Under section 17(5) then, relevant circumstances as

> to whether the presumption created by section 17(4) is rebutted when the personal information is about a deceased person, would include consideration of the kinds of privacy interests the deceased person had in the information at issue in his or her lifetime, the extent to which those interests continue to exist, whether the deceased's personal information is also the personal information of someone else, and whether there is another interest, such as a public interest, that may outweigh privacy interests or strengthen them.

And further:

> The former Information and Privacy Commissioner of Ontario considered that the fact that an individual is deceased is a factor to be weighed when deciding whether it would be an unreasonable or unjustifiable invasion of personal privacy to disclose personal information. In his view, that an individual is deceased, while only one of several factors he considered in that case, was nevertheless a factor weighing in favor of disclosure. I agree with this analysis and share the view that individual privacy interests diminish after death. If privacy interests do not diminish following death and over time, it would be entirely arbitrary for the legislature to determine that privacy rights end after twenty-five years when they do not after twenty-four years and eleven months, for example.

In Ontario Order M-50, in referring to factors relevant to determining whether it would be an unjustifiable invasion of personal privacy to disclose the personal information of a deceased individual, the former Information and Privacy Commissioner of Ontario said:

> In the circumstances of this appeal, I feel that one such unlisted factor is that one of the individuals whose personal information is at issue is deceased. Although the personal information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.

All this is to say that I am satisfied that in the particular and narrow circumstances of this case, the presumption that the disclosure of the patient's personal health information would be an unreasonable invasion of her privacy has been rebutted. I therefore recommend the disclosure of these two pages.

Pages 18 and 19

Section 14(1)(a) provides a public body with a discretion to refuse to provide an applicant with a record if the disclosure could reasonably be expected to reveal "advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council". The first thing that must be noted about this section is that it is discretionary. Keeping in mind that disclosure is the default rule, public bodies must actively exercise their discretion, where it is given, and refuse disclosure only when there are good reasons for doing so. Furthermore, the act of exercising that discretion must be obvious in some way - an indication of the reasons why access is being denied beyond simply quoting the section of the Act. In this case, the public body gave me no indication that any discretion was exercised in refusing to disclose these pages.

In previous recommendations, I have considered and accepted the view of the Office of the Alberta Information and Privacy Commissioner in their interpretation of the equivalent section of their Act (section 24). In Order 96-006, Alberta's Information and Privacy Commissioner set out the criteria for "advice" (which includes advice, proposals, analyses and policy options) under their equivalent to our section 14(1)(a). The order determined that the "advice" should be:

1) sought or expected, or part of the responsibility of a person by virtue of that person's position,

2) directed toward taking an action, and

3) made to someone who can take or implement the action.

This record is an email from the Director of Health Programs for the Department of Health in the region in which the incident took place. It is addressed to the Director of Medical Affairs for

the Department of Health, and is copied to three others, one of whom was an Assistant Deputy Minister. I am satisfied, based on the job titles of the writer and the recipients as I discovered them on the Government of Nunavut website, that the first criteria for fitting a record within section 14(1)(a) has been met - I am satisfied, based on what I can see from the record itself, that the author is an employee of the public body and that the information imparted by her in the email is imparted as part of the responsibilities of her position. Further, it would appear at first blush that the third criteria has also been met, though this is not quite so clear without some explanation from the public body in relation to the management structure of the Department of Health. I can only guess at how these employees fit into that structure.

It is the second criteria that, in my opinion, prevents these pages from being eligible for an exemption pursuant to section 14(1)(a). In Alberta Order 97-007, Commissioner Robert Clark, as he then was, made the following comments about the second criteria for a record to fit within the exemption of Alberta's equivalent to our section 14(1)(a):

> The second criteria requires a nexus between the advice and the taking of some action. Advice must contain more than mere factual information, and must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. A factual summary of events, without more, is not sufficient.

The record must include some suggestion for a course of action to be taken or be focussed on taking an action, making a decision or a choice. Setting out background information does not amount to providing or seeking advice, analysis, recommendations or policy options. Background is just that -- background information.

In the same Order, Commissioner Clark reached the following conclusion:

> While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an analyses. Gathering pertinent factual information is only the first step that forms the basis of an analyses. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

The content of these two pages does not amount to advice, as discussed above. Rather, the information in these two pages is in the nature of a report and contains factual background information about an issue. The information may well be necessary for all of the recipients to have in order to set up the consultation process so that options can be discussed. But the information that appears in this particular email is only background to that discussion. In my opinion, it is not protected from disclosure pursuant to section 14(1)(a). There are some small sections of the record which should be edited to protect the personal information of third parties - in particular:

a) in the fourth bulleted paragraph:
   i) the date at the beginning of the second line;
   ii) the last five words of the fourth line and the first two words of the fifth line;
   iii) the date at the end of the paragraph.

b) in the fifth bulleted paragraph, the date in the first line and the last word of the first line and the first three words of the second line.

I recommend that the balance of these two pages be disclosed to the Applicant.

Records from the Health Centre

This package contains 15 pages of medical records of the patient as well as correspondence between health care providers with respect to the case. For the reasons set out above, while the disclosure of this information would normally constitute an unreasonable invasion of the patient's privacy, in these circumstances, I believe that the presumption has been rebutted and that the disclosure to the patient's spouse, who accompanied her to the Health Centre and appears to have been with her for all or at least most of the ordeal, would not be an unreasonable invasion of the patient's privacy. I recommend these pages be disclosed.

Documents recieved by the Department from the Contractor in relation to the event

This package consists of six pages of mostly email correspondence between the department and the medevac contractor company. For the most part, the information is about the timelines

for the event. The narrative does, however, contain the personal health information of the patient, the Applicant's spouse. For the same reasons outlined above, I do not believe that the disclosure of this personal health information, in the unique circumstances of this case, would constitute an unreasonable invasion of the patient's privacy. I recommend that these pages be disclosed.

SUMMARY AND RECOMMENDATIONS

My specific recommendations are set out above.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner