NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 14-071
February 7, 2014

Review File: 13-165-5

BACKGROUND

The Applicant sought access to a document entitled "Memorandum of Understanding" between the Government of the Northwest Territories and the Office of the Correctional Investigator for its work regarding the Baffin Correctional Centre (BCC). He also sought the final report prepared by the Office of the Correctional Investigator (OCI) dated April 23rd, 2013. The Department of Justice released the Memorandum of Understanding, a three page document, but only portions of the Report were provided. The public body cited sections 14(1)(a), 15(a), 20(1)(h) and 20(1)(k) as justification for their refusal to disclose the edited portions.

The Applicant disputed that the records withheld were subject to any of the exemptions quoted by the public body. In the letter to my office requesting the review, the Applicant pointed out that the Memorandum of Understanding says that the OCI would provide strategic advice, and assistance in conducting a review and a report highlighting its conclusions. The Applicant spoke with the OCI Executive Director who advised that there was nothing in the report that could reasonably be considered to be privileged. He also confirmed that any advice in the report was given not to the Minister or Cabinet, but to the Corrections Division of the Department of Justice. The Executive Director was also of the opinion that nothing contained in the report could facilitate the escape of any inmate or compromise the security of the building. The Applicant pointed out that the report was commissioned at the taxpayer's expense and it outlines significant deficiencies with a public building and should, therefore, be accessible to the public "especially when the investigating agency can identify no reason why the report should not be released." He suggests that this shows "a disturbing lack of transparency and accountability."

THE PUBLIC BODY'S RESPONSE

The Department of Justice provided my office with an unedited copy of the report in question, as well as a copy of the report as disclosed to the Applicant. By way of explanation for their refusal to disclose, their explanation, in full, was as follows:

“ **s. 14(1)(a):** The documents on page 6 relate to the administration security(sic), pages 7 to 10 refer to the Conditions of Confinement and Infrastructure Limitations, Separation of Inmates on Remand and Convicted Prisoners, Static and Dynamic Security, Drugs and Alcohol while page 16 provides the conclusion. The Department of Justice refused to disclose information on these pages to CBC as the disclosure could reasonably be expected to reveal advice for a public body.

s. 15(a): Pages 11 to 17 has the Legal Framework and Policy Framework which include legal advice in relation to the condition of the Baffin Correctional Centre (BCC) and their next steps citing BCC’s legislation and policy. The advice is solicitor/client privilege

s. 20(1)(h): pages 4 to 5 describes the “Dorm Unity”, The Behavioral Unit, the “Katak” Unit, the Gymnasium, Admission, Discharge and Segregation Area, pages 22 to 23 are photographs of a Window in a cell of the Behavioral Unit and Vent in a cell of the Behavioral Unit, page 25 has photos of another view of the previous cell and page 33 shows photos of a window in the common room of the Dorm Unit. The information provided in these sections and the conditions depicted in these photographs could facilitate the escape from custody if the records are disclosed to the applicant.

s. 20(1)(k): page 3 has the general overview, page 6 defines the Programs and Education Area, Cafeteria, Conditions of Confinement and Infrastructure Limitations, pages 20 to 21 show photographs of the Gymnasium (used dormitory) and Cell of the Behavioral Unit, page 24 shows a photo of a view of another cell in the Behavioral Unit, pages 26 to 32 show photos of the Bottom of the wall in the hallway next to the Behavioral Unit, Partial view of the shower of the only shower (sic) of the Behavioral Unit, Common room of the Dorm Unit, Housing 42 inmates, Showers of the Dorm Unit, also used by inmates housed in the Gymnasium, Partial view of the (sic) one of the showers of the Dorm Unit, One of the Toilets of the Dorm Unit, Detail view of the toilet of the Dorm Unit and page 34 shows a photo of the Secured Interview room. The written and photographic records displaying the condition and infrastructure above may prejudice the security of BCC could facilitate the escape from custody of an inmate.”

No further explanation was provided as to how the disclosure of this information might result in the stated outcomes.

THE APPLICANT'S RESPONSE

The Applicant was provided with a copy of the Department's response and, by way of reply provided a copy of an email from the Executive Director of the OCI which confirms that the Office of the Correctional Investigator had no concern regarding the public release of the MOU or the report, including the names of the OCI staff who conducted the review. That email, in fact, says that the OCI believes that the report should be made public in its entirety. The Applicant also provided a copy of a news report from CBC Iqaluit which suggests that Nunavut justice officials took CBC news reporters on an "all access tour of the jail" in February, 2010. The news report describes many of the deficiencies and difficult conditions within the jail which the public body now claims should not be disclosed. Another news report from May, 2010 was provided in which, once again, the issue of overcrowding and safety concerns were reported and in which a former government official was quoted discussing the same kinds of deficiencies as are outlined in the OCI's report.

The Applicant argued that the long standing problems at BCC were of high public interest and concern. While only two stories were provided, the Applicant indicated that he could have provided many more news reports about this issue.

The public body was provided with a copy of the Applicant's correspondence and invited to provide any further submissions they might have, but nothing further was received from the public body.

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 of 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.

Section 14(1)(a) of the *Access to Information and Protection of Privacy Act* provides public bodies with the discretion to refuse access to records where the disclosure of those records might reveal "advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council. Section 14(2)(e), however, provides that subsection (1) does not apply to information that is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal.

Section 15(a) allows that the head of a public body **may** refuse to disclose to an applicant information that is the subject of any type of privilege available at law, including solicitor-client privilege.

Section 20(1) again provides public bodies with the discretion to refuse to disclose information to an applicant where there is a reasonable possibility that the disclosure could:

> h) facilitate the escape from custody of an individual who is being lawfully detained; ... or
>
> k) prejudice the security of any property or system, including a building, a vehicle, a computer system or a communications system;

Also relevant to the discussion is section 33(1) which states as follows:

> 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.

This section requires public bodies to justify their refusals. As discussed below, it is not sufficient to simply make a statement that the section applies. The public body must provide sufficient evidence to support their contention that an exemption applies.

DISCUSSION

Section 33 puts the onus on the public body to establish that an applicant has no right to access a record.

In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner*), 2006 ABQB 515 (CanLII), 2006 ABQB 515 the Alberta Court of Queen's Bench considered what this means and determined that a public body must provide evidence to support its arguments that there would be a risk of harm if information is disclosed. The Court said:

> The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.
>
> The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm."

The evidence must show that there is a reasonable expectation that a particular "harm" will result from the disclosure of the information contained in the records, and not from factors other than the disclosure of the information in question.

Similarly, in *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054 (Fed. T.D.), the court considered the issue of "harm" contemplated by the disclosure of information under the Federal equivalent of our *Access to Information and Protection of Privacy Act*. In that case, the court stated that

(i) there must be a clear and direct linkage between the disclosure of the specific information and the harm alleged, and

(ii) the court must be given an explanation of how or why the harm alleged would result from disclosure of the specific information.

"This requires evidence linking the harm described and the disclosure of specific pages of the record and an explanation of why, in all the circumstances, the disclosure of the contents of the record would cause such harm."

Section 20(1) (h) and (k)

The public body has relied on these two sections to refuse disclosure of the following parts of the report:

Section 20(1)(h) - disclosure could facilitate escape from custody

- pages 4 and 5
- pages 22 and 23
- page 25
- page 33

Section 20(1)(k) (prejudice the security of a facility)

- page 3
- page 6
- pages 20 and 21
- page 24
- pages 26 to 32
- page 34

They have not provided this office with any explanation as to how the disclosure of these pages (or portions of pages) might facilitate an escape or prejudice the security of the facility. Nor, frankly, is there anything in the pages themselves which would lead me to the inevitable conclusion that the disclosure might cause the harm noted. That the conditions in the facility are difficult is clear, but this is not news to anyone who has paid any attention to the news in Iqaluit or in Nunavut over the last four years or more, or to anyone unfortunate enough to have found themselves incarcerated in the facility. None of what is outlined in the deleted portions of the

written report or any of the pictures would disclose anything not already known by at least a sector of the public. The report only confirms information already in the public through previous news reports and through former inmates who have returned to their communities after having served time in the facility. I am at a loss to understand how pictures of a washroom facility within the building, with no windows, might prejudice the security of the facility or facilitate an escape.

The public body has not met the onus of establishing that the disclosure of these parts of the report raise an exemption pursuant to section 20(1)(h) or 20(1)(k). Furthermore, there is no indication that the public body in any way exercised it's discretion under these sections.

I recommend that all of the portions of the report to which access has been denied pursuant to either section 20(1)(h) or 20(1)(k) be disclosed.

Section 14(1)(a)

The public body has denies access to portions of the report at page 6, pages 7 to 10 and page 16 pursuant to section 14(1)(a).

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 report in question was prepared as a result of a Memorandum of Understanding between the Department of Justice, Corrections Division and the Office of the Correctional Investigator of Canada. The Memorandum of Understanding was signed, on behalf of the GN, by the Deputy Minister of Justice.

Under the terms of the MOU, the OCI was to “conduct a review of BCC’s infrastructure and functionality through a human rights lens that would complement existing assessments and evaluations”. It also contemplated that the OCI would provide “strategic advice” to NU Corrections on “legislative and policy matters”

Each of the deleted sections must be individually evaluated based on the tests described above:

1) was the report sought by a person by virtue of that person’s position?
2) was the report directed toward taking an action?
3) was the report made to someone who can take or implement the action?

The first part of the report deleted pursuant to section 14(1)(a) is at the top of page 6. I am satisfied, for the purpose of this review, that parts one and three of this test have been met. I am satisfied that the report was sought by the Deputy Minister and that it was sought by him pursuant to the responsibilities of his position within the GN. While I am not entirely convinced that the Deputy Minister would be in a position to take an action with respect to the contents of the report or to implement its recommendations, I am prepared to accept that the Deputy Minister is in a position to influence action on the issues raised in the report, though I doubt very much that he has a lot of power to implement any action which would address the issues raised in this particular report. This is another situation in which the Department has the onus of

establishing that the exemption applies, but has failed to meet that onus by providing the basis for the application of the section. For the purposes of this review, however, I am prepared to assume that the Deputy Minister of Justice is able to "take or implement" certain actions.

Where I am not convinced that the test has been met is in the second requirement - was the report, or those sections of the report for which section 14(1) has been used to deny access, directed toward taking an action? 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 focused on taking an action, making a decision or a choice. Setting out background information or stating conclusions about the current state of affairs does not amount to providing advice, analysis, recommendations or policy options.

Based on this, it is my conclusion that the following sections of the Act do not suggest any course of action and they do not, therefore, meet the requirements for an exemption under section 14(1):

- page 6, second sentence, paragraph 1
- page 6, last sentence, paragraph 3
- page 6, second and third sentences, paragraph 4
- page 6, entire last paragraph
- page 7 (entire page)
- page 8 (entire page)
- page 9 (entire page)
- page 10 (entire page)

I recommend these sections of the report be disclosed.

The Department has also applies section 14(1)(a) to that portion of page 16 under the heading "Conclusion". The first paragraph of this section and the first three sentences of the second paragraph, once again, do not suggest any course of action and they do not, therefore, qualify for an exemption under section 14(1)(a) of the Act. These portions of page 16 should be disclosed.

The last sentence of the second paragraph and the two numbered paragraphs which follow may constitute a suggested course of action. In fact, however, the way it is worded suggests that these comments are more in the nature of an opinion on how certain changes to the department's policies and procedures might result in positive outcomes. This portion of the report might qualify for an exemption from disclosure pursuant to section 14(1)(a) IF there were evidence that the recommendations made in this report were directed to specific changes in legislation or policy to be implemented by the department. There is no such evidence. Section 14(2)(e), provides that subsection (1) does not apply to information that is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal. In my opinion, the report, in fact, is the outcome of just such background research of a technical nature sought by the public body for the purpose of assisting them in formulating their policies on a go-forward basis. The OCI has technical expertise in the administration of correctional institutions. They were asked by the GN to undertake a review of the BCC and provide a report highlighting its conclusions. It seems to me that this qualifies the report as the result of background research of a technical nature.
The OCI is an ombudsman's office. They may well make recommendations for improvements and changes but those recommendations are based on their own independent investigations and their own independent conclusions. I do not see this report as being sought by the public body in this case for the purpose of developing the public body's specific legislative or policy position on any issue. Rather, it appears to be more in the nature of gathering background information so that the department has all of the options before them while they develop their policy position. While this report offers suggestions for change and for legislative amendments, those suggestions are not intended as advice or analysis, but as the independent ombudsman's conclusions based on his/their observations and experience. There is nothing to suggest that this report is intended to form the basis of the public body's policy direction.

Even if section 14(1)(a) did provide the public body with an exemption the public body is still required to use its discretion and make a thoughtful determination as to whether or not to disclose the information, keeping always in mind the underlying rule that disclosure is the rule and refusal to disclose the exception to be used only when there are sound (and articulated) reasons for that refusal that go beyond "because we can". I see no evidence, in this case, that that discretion has been exercised.

I am not convinced that section 14(1)(a) applies to anything on page 16 of the report.

Section 15(a)

The public body argues that pages 11 to 17, in their entirety "has the Legal Framework and Policy Framework which include legal advice in relation to the condition of the Baffin Correctional Centre (BCC) and their next steps citing BCC's legislation and policy." As a result, they say, the "advice" is protected from disclosure by reason of the existence of solicitor/client privilege.

It is to be noted that section 15 of the Act is, once again, discretionary in nature. Where the section applies, the public body still must actively exercise their discretion and determine whether or not they will disclose the information involved, once again keeping in mind the rule that disclosure is always the rule and refusal to disclose should only occur when there is a good, considered reason for such refusal.

To correctly apply section 15(a), the public body must meet the criteria for the privilege claimed, in this case solicitor/client privilege. Those criteria are set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In that case, the Supreme Court of Canada states that solicitor/client privilege must meet the following criteria for the privilege:

(i) it must be a communication between solicitor and client;
(ii) which entails the seeking or giving of legal advice; and
(iii) which is intended to be confidential by the parties.

The difficulty I have in accepting the public body's claim of solicitor/client privilege for these seven pages of the report is that I am not convinced that there is or was a solicitor/client relationship between the department and the Office of the Correctional Investigator. While the authors of the report were both lawyers, that in and of itself is not sufficient to create a solicitor/client relationship. The web page for the OCI states that its mandate is as follows:

> As the ombudsman for federally sentenced offenders, the Office of the Correctional Investigator serves Canadians and contributes to safe, lawful and humane corrections through independent oversight of the Correctional Service of Canada by providing accessible, impartial and timely investigation of individual and systemic concerns.

There is nothing in this mandate or in the MOU which leads me to the conclusion that a solicitor/client relationship existed between the OCI and the Corrections Division of the Department of Justice. The Miriam Webster dictionary defines an ombudsman as :

1. a government official appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials
2. one that investigates, reports on, and helps settle complaints

The role of an ombudsman is independent oversight. As such, there is no solicitor/client relationship between the GN and the ombudsman. The fact that this ombudsman was asked to investigate the state of affairs at BCC does not create a solicitor/client relationship any more than my being asked to review a response to a request for information creates a solicitor/client relationship between myself and the applicant. The OCI is independent. It's role is to advocate on behalf of a sector of the population - in this case federally sentenced offenders. That it provided a report and recommendations on matters which touch on the legal and policy framework of the Nunavut Department of Justice does not change the nature of the report. As an independent oversight body, the OCI would be well outside of its mandate to be providing legal advice subject to solicitor/client privilege. As such, section 15 does not apply to any part of the report. I recommend that pages 11 through 17 be disclosed.

SUMMARY AND RECOMMENDATIONS

Disclosure is always the rule under the *Access to information and Protection of Privacy Act*. While the act provides for exceptions to this rule, those exceptions are narrow. In order to prevent disclosure, the information must fit squarely into the four corners of the exception. The onus is on the public body to provide the necessary evidence to support its use of the exceptions to disclosure. In this case, the public body has simply not met that onus in any way. Nor is there anything within the document itself from which I can conclude that any of the stated exemptions apply.

I recommend that the report be disclosed without any deletions or redactions.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner