

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 14-079

August 5, 2014

Review File: 13-188-5

BACKGROUND

In November of last year, the Applicant made an Access to Information request of the Department of Economic Development and Transportation (E.D. & T) for records pertaining to medevac flights to and from Kitikmeot communities and containing details of times, flight durations, stopovers, identification of carrier, number of patients, type of registration of aircraft, origin and identification of air crew and origin and identification of flight crew. The public body responded, indicating that there were no responsive records in the custody or under the control of the Department of E.D. & T. The Applicant asked me to review this response. He indicated that legally, all air traffic in and out of any airport is documented and filed at each airport.

THE DEPARTMENT'S EXPLANATION

In its response to my request for an explanation, and in answer to a number of specific question posed, the public body made the following submissions:

1. All air navigational services in Canada are provided by Nav Canada. These services include flight planning, which documents all flights in and out of airports. While flight plans contain extensive data, they are filed by pilots and aircraft operators directly with Nav Canada and are not in E.D. & T.'s custody or under E.D. & T.'s control. This said, they indicated that in many Nunavut airports, Nav Canada's services are provided through a "Community Aerodrome Radio Station" (CARS) and the Government of Nunavut acts as a contractor to Nav Canada for the CARS program. The Government of Nunavut, in turn, subcontracts the CARS operation out on a site by site basis. CARS operators record minimal information on airport arrivals and departures during station hours. This information is forwarded to Statistics Canada, where it is used to generate

statistics. CARS operators may also act as a conduit to close flight plans on a pilot's behalf.

2. The legal requirements for airports to collect aircraft movement and passenger statistics are quite limited, and are contained in section 303.06(1) of the *Canadian Aviation Regulations*:

303.06(1) The operator of an airport or aerodrome shall review, at least once every six months, the statistics in respect of the number of emplaned and deplaned passengers resulting from the Electronic Collection of Air Transportation Statistics project carried out jointly by the Department of Transport and Statistics Canada for the twelve months preceding the date of the review and determine whether the airport or aerodrome qualifies as a designated airport under subsection 303.02(1).

3. When this Request for Information came in, the ATIPP Co-Ordinator consulted departmental subject matter experts to determine whether the department possessed responsive records. Since those inquiries strongly indicated that no such records existed, he did not pursue the matter further.

4. Section 602.74 of the *Canadian Aviation Regulations* sets out the requirements for a flight plan. This information is also published by Nav Canada. The requirements include most, if not all, of the information requested by the Applicant.

5. Nav Canada requires flight information for the purpose of monitoring the status of flight plans, and for billing air carriers for enroute and terminal navigation fees. Flight plans through Nunavut airports are filed through Nav Canada in North Bay (Ontario?) and takeoff and landing movements are logged at the airports. Daily air traffic records on aircraft movements are collected by subcontractors to the Government of Nunavut, which acts as contractor to Nav Canada for delivery of the CARS program. These

records are forwarded from each site to Statistics Canada on a monthly basis. Copies of these records are retained on site for a period of five years. These records are logged on a Nav Canada form and are treated as Nav Canada's property. These records contain some of the information the Applicant was seeking and they only capture information about flights occurring during CARS operating hours and would not, therefore, capture "all medevac flights".

6. The Government of Nunavut is the owner and operator of all public airports in Nunavut and is responsible to ensure that the airports are operated in regulatory compliance with the aviation regulations in regards to safety, security and accessibility, and to manage the lands associated with the airports in a manner that maximizes economic opportunity for Nunavummiut.

7. The public body did not take any steps pursuant to section 7 of the *Access to Information and Protection of Privacy Act* to assist the Applicant to discover the records he needed. They took the position that:

...even if we assisted the applicant to develop a substantially modified request....and through this request we identified responsive records in our custody or under our control (assuming our contract with Nav Canada did not prohibit disclosure, and ignoring the unreasonable interference with departmental operations that compiling such records at community airports would represent) it remains the case that the requested information is "otherwise available to the public" through Nav Canada

The public body admits that it could have referred the applicant to Nav Canada but in this case they considered that to be "superfluous" as the Applicant had already indicated in his request for information that he was seeking the same information from Nav Canada.

The response from the public body also contained the following statement:

I would question whether the applicant truly believes, as per section 6(1) of the Act that the Department of Economic Development and Transportation possesses information such as the number of patients on a flight, or the origin and identification of medical staff on medevac flights. In my view, this scattershot, “one stop shop” approach to submitting ATIPP requests unduly relieves applicants of their obligation under section 6 to submit requests to the public body that the person believes has custody or control of the record. It is understandable that first time applicants may need assistance identifying the correct public body, but experienced applicants can be expected to know. I will endeavor to be more firm with applicants in the future, and I am confident that this will result in improved requests and improved responses.

DISCUSSION

My discussion of this matter has to start with the final statement outlined above. The *Access to Information and Protection of Privacy Act*, does not impose any obligations or responsibilities on the public. To the contrary, it gives the public the **right** to access public records. The Act does, however, impose certain legal obligations and responsibilities on public bodies. It is not for an employee of a public body to judge the quality of a request for information, to question in any way why the individual is asking for that information, to draw conclusions about an applicant’s motives or to state an opinion about those motives or the applicant’s approach. Nor does it matter what the Applicant knows or ought, in the opinion of the ATIPP co-ordinator, to know about whether or not a request for information will produce records. Section 7 imposes a duty to assist. If there is a concern that an applicant is abusing the system, there are ways of addressing that, including asking my office to authorize a public body to disregard further requests from any particular individual. There is absolutely nothing in this particular request for information that would amount to an abuse of the system or an abuse of the rights granted to the public under this Act. There is nothing before me to suggest that this Applicant knew or ought to have known that his request for information

would come up empty. Further, asking employees or contractors in the community to identify and produce records does not, by itself, amount to an “unreasonable interference with departmental operations”. Rather, it is an obligation imposed on all public bodies by law. This legislation gives the public the **right** to demand access to whatever records are in the custody or control of the public body.

I am concerned that the ATIPP Co-ordinator for this department - the person who should be most well acquainted with the Act and the spirit and intention of the Act - should be so ignorant of the basic principals behind it or so defensive about producing records under it. The attitude expressed in the public body’s response is of additional concern in that it comes from an individual who is in a senior administrative position in this department. Leadership comes from the top and the fact that this ATIPP Co-ordinator clearly feels that the obligations imposed by the *Access to Information and Protection of Privacy Act* are onerous and annoying will translate into how this department deals with Access to Information requests. This is not in keeping with the way in which the Government of Nunavut has embraced this legislation generally and not, I believe, the way in which the people of Nunavut expect it to be embraced.

With respect to the review itself, it is clear from the submissions of the public body that the Government of Nunavut does, in fact, have custody and control of records which are responsive to the Request for Information. The Government of Nunavut has a contract with Nav Can to collect certain information about flights in and out of communities. Section 5 of the Act provides 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” (emphasis added). To the extent, then, that the Department of E.D. &T. has “custody” of the information which it or its subcontractors collect and create records from, these records are subject to disclosure unless they fall within one of the exemptions of the Act. The department’s position that these records are “treated as Nav Canada’s property” means nothing to me in terms of whether or not they can be disclosed pursuant to an ATIPP request. It is not a requirement of the Act that the records “belong” to the public body. It is a requirement only that they have custody

(possession) or control of the records. It may be that an exemption applies, but the public body has not even considered this because they have decided that the records should be treated as being the property of Nav Canada.

The public body also suggests that there is no requirement for them to produce the records requested because the information is “otherwise available to the public” through Nav Canada. Presumably, this is a reference to section 25(1) of the Act which states:

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.

I have several comments about this:

- a) Subsection (2) of this section, provides that when this section is used, the public body “shall inform the applicant where the information is or will be available.” That was not done in this case.
- b) This is a discretionary provision. In all cases under the Act, disclosure is the rule and exemptions and exclusions are to be narrowly defined. Where the discretion is exercised so as to refuse access, there must be a clear exercise of that discretion. There is no indication in this case that the public body exercised any such discretion.
- c) This provision applies to records that are generally available to the public through pro-active disclosure and published reports. There is no indication that these records are publicly available through Nav Canada. To obtain the records from Nav Canada, the Applicant would have to make another Access to Information Request of this federal body. Following the department’s logic to its inevitable conclusion, if each of these two public bodies (one federal and one territorial) take the position that the records

are available from the other of them through an ATIPP request, and therefore refuse to provide the records requested, the Applicant would be effectively denied access. That is not the intention of this section.

- d) Finally, it would appear that the information provided in the public body's submissions that CARS submits its data to Statistics Canada, not to Nav Canada and that Statistics Canada compiles the data into statistics. While these statistics may be available from Statistics Canada, it is fairly clear that in this case the Applicant is not looking for statistical information, but for specific data about medevac flights out of communities in the Kitikmeot.

Simply put, section 25 does not apply in this situation.

I have to conclude that, while the public body may not have records which contain all of the information the Applicant is seeking, there are records that are responsive to the Request for Information in the custody and/or control of the Department and the Department has provided no valid reason that the records should not be disclosed.

CONCLUSIONS AND RECOMMENDATIONS

While the Department adamantly denied that there were any responsive records in this case, their submissions indicate otherwise. According to their submissions, the Government of Nunavut collects certain information about air traffic in the Kitikmeot communities under contract with Nav Canada. The information may not be everything that the Applicant wants, but these records are at least partially responsive to his request for information. Once collected, the information is shared with Nav Canada and/or Statistics Canada. However, copies of the records kept are retained on site for five years. These records are in the custody and control of the Department or its subcontractors. The records fall squarely within the definition of "records" under the ATIPP Act and are, therefore, subject to an access to information request. The public

body has provided no indication that there are any applicable exemptions and the onus is on them to establish that an exemption applies.

I therefore recommend that the public body provide the Applicant with all records responsive to his request which exist in CARS for communities in the Kitikmeot as outlined in his Request for Information.

While I would like to recommend further action be taken with respect to improving this department's approach to ATIPP requests, this is not something that I can direct. It is something that must come from within and, preferably, from within at the top. The ATIPP Act is intended to help public bodies to be more open and accountable to the public they serve. Public bodies can embrace the spirit and intention of the Act or they can fight it. The approach each public body takes is a reflection of its leadership, however, and nothing I can recommend will effect the change needed unless and until the leadership chooses to embraces openness. That said, I would very much like to see a change in the approach taken by this public body with respect to how this law applies to them.

Elaine Keenan Bengts

Nunavut Information and Privacy Commissioner